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Supreme Court, U.S.
FILED

SEP 16 2003

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No. 03 441

IN THE

SUPREME COURT OF THE UNITED STATES

S.G., AS GUARDIAN AD LITEM OF A.G., A MINOR, AND S.G., INDIVIDUALLY,
Petitioners,

v.

SAYREVILLE BOARD OF EDUCATION, GEORGIA B. BAUMANN AND WILLIAM L. BAUER, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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September 16, 2003

QUESTIONS PRESENTED

I. May public educators punish through suspensions, without violating the First Amendment, students of tender years for engaging in expressive activity which is neither lewd nor disruptive but which in the personal view of the educators is an inappropriate manner of speech?

II. What process is due students of tender years where there is a reasonable likelihood that they may be unable to comprehend the significance of the proceedings and there exists no imminent danger of harm to either the students or third persons?

PARTIES TO THE PROCEEDING

The Petitioner in this matter is S.G., individually, as guardian ad litem of A.G., a minor individual.

The Respondents are Sayreville Board of Education, the govering body of a public school district duly organized and existing under the laws of the State of New Jersey;Georgia M. Baumann, who is sued individually; and William L. Bauer, who is sued individually.

TABLE OF CONTENTS

Questions Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinions and Orders Below 1

Jurisdictional Statement 2

Constitutional and Statutory Provisions 2

Statement of the Case 3

Reasons for Granting the Writ 13

I. CERTIORARI IS APPROPRIATE TO ADDRESS THE IMPORTANT CONSTITUTIONAL QUESTION WHETHER PUBLIC EDUCATORS VIOLATE THE FIRST AMENDMENT BY PUNISHING THROUGH SUSPENSIONS CHILDREN OF TENDER YEARS FOR ENGAGING IN EXPRESSIVE ACTIVITY WHICH IS NEITHER LEWD NOR DISRUPTIVE, BUT WHICH IN THE SUBJECTIVE VIEW OF THE EDUCATORS CONSTITUTES SOCIALLY INAPPROPRIATE BEHAVIOR. 14

II. CERTIORARI IS APPROPRIATE TO ADDRESS THE IMPORTANT CONSTITUTIONAL QUESTION WHAT PROCESS IS DUE STUDENTS OF TENDER YEARS WHERE THERE IS A REASONABLE LIKELIHOOD THAT THEY MAY BE UNABLE TO COMPREHEND THE SIGNIFICANCE OF THE PROCEEDINGS AND THERE EXISTS NO IMMINENT DANGER OF HARM TO EITHER THE STUDENTS OR THIRD PERSONS. 16

Conclusion 18

TABLE OF AUTHORITIES

CASES

Bethel School Dist. v. Fraser, 748 U.S. 675 (1986) 12, 14, 15

C.H. v. Oliva, 226 F.3d 198 (3rd Cir. 2000) 14

Goss v. Lopez, 419 U.S. 565 (1975) 17

Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988) . . . 4, 14

Mathews v. Eldridge, 424 U.S. 319 (1976) 16

Palmore v. Sidoti, 466 U.S. 429 (1984) 16

S.G. v. Sayreville Board of Education, et al., Civ No. 00-2727, April 24, 2002 (USDC Dist. N.J.) 1

S.G. v. Sayreville Board of Education, et al., 333 F.3d 417 (3rd Cir. 2003) . . . . . *passim*

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 4, 13, 14

Walz v. Egg Harbor Twp. Board of Educ., 2003 U.S. App. LEXIS 18148 (3rd Cir. 2003) 15

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

UNITED STATES CONST., AMEND. I . . . . . *passim*

UNITED STATES CONST., AMEND. V 2, 3

UNITED STATES CONST., AMEND. XIV, §1 . . . . . 3, 17

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1343 2

CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983 12

42 U.S.C. § 1988 12

FED. R. CIV. PROC. 56(c) 2, 12, 14

FED. RULE APP. PROC. 4(a)(1)(A) 2, 12

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners S.G., as Guardian ad Litem of A. G., a minor, and S.G., individually, respectfully petition this Honorable Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in *S.G. v. Sayreville Board of Education, et al.*, No. 02-2384 (June 19, 2003). Petitioners seek review of the Court of Appeals' affirmation of the final order of the trial court which granted the defendants summary judgement dismissing all claims of the plaintiffs and the appeals court's determination that there was no denial of Petitioners' constitutional rights to free speech, procedural due process and equal protection of law.

OPINIONS AND ORDERS BELOW

The decision of the Third Circuit Court of Appeals in *S.G. v. Sayreville Board of Education, et al.*, No. 02-2384, dated June 19, 2003, is published at 333 F.3d 417 and appears as Appendix A hereto.

The Transcript of the Oral Argument held on April 24, 2002, before the United States District Court for the District of New Jersey in *S.G. v. Sayreville Board of Education, et al.*, Civ. No. 00-2727, is unpublished, and appears at Appendix C hereto. The accompanying unpublished Order Granting Defendants' Motion to Dismiss, filed April 24, 2003, appears as Appendix B.

JURISDICTIONAL STATEMENT

Jurisdiction was had in the District of New Jersey in the first instance, insofar as Petitioners' Complaint, filed June 5, 2000, stated claims arising under the Constitution and statutes of the United States. 28 U.S.C. § 1343. *See* App. D (Complaint). The United States District Court granted Respondents' Motion for Summary Judgment pursuant to FED. R. CIV. PROC. 56(c) by Order dated April 24, 2002. Appendix B (Order) Appeal was timely taken to the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1291 (appeal of a district court final judgment) by filing Notice of Appeal on May 16, 2002. FED. RULE APP. PROC. 4(a)(1)(A).

The Third Circuit affirmed by a three judge panel opinion dated June 19, 2003. Appendix A. The Supreme Court has jurisdiction to review the judgment in question on writ of certiorari in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONST. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

UNITED STATES CONST. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONST. Amend. XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction

Petitioners alleged in their Complaint that Respondents acted under color of state law when they deprived a six year old student of the rights, privileges, and immunities secured by the First, Fifth and Fourteenth Amendments of the Constitution by automatically suspending a child of tender years for words spoken and gestures made during non-curricular time at recess on the playground (as opposed to actions in the classroom during formal instruction), *cf.*

Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988), while playing a typical children's game of "cops and robbers." The District Court and the Court of Appeals held that the severe punishment meted out was within the school officials' discretion, despite no finding that the boys' words and actions constituted a "material and substantial" disruption or threat thereof, *cf. Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and were not lewd or otherwise socially repugnant. *Cf. Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986). In so doing the courts below found that the boys' expression due to their young ages and the nature of their speech was of *de minimas* value and the school officials could appropriately judge it as socially unacceptable in light of prior incidents of actual threats at the school and recent killings committed by a young student in Michigan. The courts below further found that Petitioner A.G. had received all the procedural due process that he was due even though his "opportunity to be heard" was not in the presence of his parents, prior to imposing punishment the officials had no reasonable belief that there was any existent danger, and the official conducting the investigation admitted that A.G. did not understand the nature of what was occurring.

Petitioners submit that the Court of Appeals has created a new standard which unreasonably defers to what local school officials subjectively define as "acceptable social behavior" and which is contrary to the holdings of this Court in *Tinker, Fraser,* and *Hazelwood.* Petitioners also submit that the decision of the Court of Appeals has revealed a critical gap in constitutional jurisprudence as to what due process is due extremely young students in circumstances such as the present case.

Factual History.

In March of 2000, the minor Petitioner, A.G., was a kindergarten student at the Wilson Elementary School in Sayreville, New Jersey. Defendants' Statement of Facts, App. I1, I3, ¶¶ 1, 11. Prior to the event in question and over the period of one week, three separate incidents occurred at Wilson Elementary School wherein students directly or indirectly threatened another student or teacher. App. I1-I2, ¶¶ 6-8. On March 4, 2000, a student was suspended for three days for telling other children that he intended to "shoot the freaking teacher." *Id.*; App. I. Also on March 4, 2000, another student, in an unrelated incident, was suspended for three days after he threatened a classmate that he would put a gun in his mouth and kill him. *Id.* March 10, 2000 a student was suspended for three days after advising a classmate that his mother allowed him to bring guns to school in his backpack. *Id.*

Because of these incidents, on March 10, 2000, Defendant Baumann warned each class about weapons and violence and sent a letter home with the students regarding these issues. Plaintiffs' Statement of Facts, App. H6, H13, ¶¶ 29, 54; Defendants' Statement of Facts, I2-I3, ¶¶ 9-10. The letter indicated that there was a zero tolerance policy in regard to weapons and violence. *Id.* A.G. was absent with strep throat for three days, one day of which was the day this lecture occurred, and therefore neither he nor his parents had any knowledge of the potential penalty for playing a normal and usual childhood game during playtime. Plaintiffs' Statement of Facts, App. H13, ¶ 54.

On March 15, 2000, A.G. and three of his fellow students were each suspended for three days for conduct that occurred on the playground during a recess period - A.G., along with his friends

Kyle, Justin and Mike, "were playing cops and robbers." Defendants' Statement of Facts, App. I3-I4, ¶¶ 11, 17. This was a "make believe game" in which the boys "were using their fingers to play out the game." Plaintiffs' Statement of Facts, App. H3, ¶ 14.

As part of their game, Michael, Kyle and Justin, said to each other, "Watch out. We got bazookas." Plaintiffs' Statement of Facts, App. H3, ¶ 15. During this game A.G. said to his friends, "I'm going to shoot you."[1] Plaintiffs' Statement of Facts, App. H3, ¶ 16.

Toward the end of recess and after they were done playing, a girl in A.G.'s class named Taylor, who was calmly watching them, ran to tell a teacher what they had been doing. Plaintiffs' Statement of Facts, App. H3, ¶ 17. Taylor was the only non-participant watching because the other children "were all playing with stuff." Plaintiffs' Statement of Facts, App. H-3, ¶ 18. After Taylor reported them to a teacher, that teacher took them from recess to the principal. Plaintiffs' Statement of Facts, App. H3, ¶ 19. The teacher was not Miss McKenna, their own kindergarten teacher. Plaintiffs' Statement of Facts, App. H3, ¶ 20.

Prior to being suspended, A.G. and his playmates were questioned by defendant Baumann about what had occurred. Defendants' Statement of Facts, App. I16, ¶ 16. The suspensions

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[1] On a number of occasions the District Court referred to the statement as "I have a bazooka, and I'm going to kill you." *E.g.*, Transcript of Oral Argument, App. C, T. 30-13. This is contrary to the record wherein even Principal Baumann's handwritten notes reference the word "shoot" as opposed to kill.

of A.G. and his playmates were approved by Assistant Superintendent Fyffe and Superintendent Bauer. Defendants' Statement of Facts, App. I16, ¶ 17. Defendant Baumann unsuccessfully attempted to reach A.G.'s parents by telephone to inform them of the incident and the suspension prior to sending A.G. home. Defendants' Statement of Facts, App. I4-I5, ¶ 20. Baumann, instead, sent a letter home with A.G. to inform A.G.'s parents of the incident and the decision to suspend A.G. for three days. Defendants' Statement of Facts, App. I5, ¶21. The letter simply stated that "Anthony was involved with three other children in an episode on the playground. At that time he told the children "Boom I have a bazooka and I want to shoot you." Plaintiffs' Statement of Facts, App. H4, ¶ 22. Defendant Baumann proceeded to inform Defendant Bauer regarding her course of action and "she indicated that apparently there were boys playing cops and robbers." Plaintiffs' Statement of Facts, App. H5, ¶ 27. In fact, Defendant Baumann concluded prior to suspending A.G. and his three playmates that these boys had not issued threats to any classmate nor did they have any intent to cause physical harm to each other or to any other student. Plaintiffs' Statement of Facts, App. H6, ¶ 28.

A.G. did not comprehend what happened and his mother states that A.G. "wanted to go to school. He didn't understand why he couldn't go to school." Plaintiffs' Statement of Facts, App. H14, ¶ 56. As a result of the suspension, "was upset. He goes to school. 'What do you mean, I can't go?'" and was upset for all three days of his suspension. *Id.*

After learning of the suspension, A.G.'s father contacted defendant Bauer and explained that his son was only five years old and that he didn't agree with what had occurred, to which Bauer

responded "that his hands were tied, policy was policy and he has to stand behind the decision of the principal." Plaintiffs' Statement of Facts, App. H11, ¶ 52. After calling Superintendent Bauer, A.G.'s parents did not attempt to further contest his suspension because, "he got sent home with a letter saying your son's suspended. We called Mr. Bauer who was the top of the list and we were shot down, so it was a done deal." Plaintiffs' Statement of Facts. App. H13 ¶ 55.

A.G. served the entire three day suspension and, after attending the "re-entry conference" with his parents, was re-admitted to school and finished the year without incident. Defendants' Statement of Facts, App. I5, ¶22. At the "re-entry" meeting between defendant Baumann and A.G.'s parents, Bauman specifically stated that the suspension was pursuant to a zero tolerance policy that did not take into account any mitigating circumstances such as the age of the child. Plaintiffs' Statement of Facts, App. H11-H14, ¶ 53; and, although the record of A.G.'s infraction and suspension were not made part of his "permanent scholastic record," they were recorded in "a separate file" where "by law...infractions may be recorded and may be maintained by the principal," Plaintiffs' Statement of Facts, App. H14, ¶ 57. Such a file for the school year of A.G.'s infractions is still maintained pursuant to a policy to "keep them on file for a number of years," and that information in the file would upon request be disclosed to a principal of a subsequent school attended by a student identified in the disciplinary file. *Id.*

In her letter of March 10, 2000, Baumann initially informed parents that it was being written because of concerns over a student who made a "reference" to weapons and then explicitly stated that, "statements in which reference is made to violence or weapons"

were serious matters and that "immediate disciplinary action will be taken." Defendants' Statement of Facts, App. I2, ¶ 9; Plaintiffs' Statement of Facts, App. H6, ¶ 29. This letter of March 10, 2000 was read and approved by Superintendent Bauer before it was published by defendant Baumann. Plaintiffs' Statement of Facts, App. H6, ¶ 30.

Although the three prior incidents involving specific threats to do harm to other students or bring a weapon to school were, unlike A.G.'s, of undeniable gravity, Defendants' Statement of Facts, App. I1-I2, ¶¶ 6, 7, 8, and there were no aggravating factors in A.G.'s case to support an enhanced punishment for him, the punishment was exactly the same. Plaintiffs' Statement of Facts, App. H6, ¶ 31.

Defendant Baumann did not require the approval of the Superintendent in order to suspend students in her school. Plaintiffs' Statement of Facts, App. H7, ¶ 32. When suspensions occur, however, they are always reported to the Board. Plaintiffs' Statement of Facts, App. H6, ¶ 33.

Defendant Baumann, in suspending A.G. for three days, followed the Board's Policy #525, which provided:

> The Board requires each student of this district to adhere to the rules and regulations promulgated by the administration and to submit to such disciplinary measures as are appropriately assigned for infractions of those rules... Disruptive pupils in the secondary grades will be disciplined in accordance with Board policy on suspension and expulsion. Disruptive pupils in the elementary grades will be reported to the building principal, who may discipline

the pupil in accordance with this policy.

Plaintiffs' Statement of Facts, App. H7, ¶ 34.

Defendant Baumann testified that she understands the "this policy" language set forth above referred to Policy #525. Plaintiffs' Statement of Facts, App. H7, ¶ 35. Policy #529 (which defendants now claim was in part "relied upon" by defendant Baumann, Plaintiffs' Statement of Facts, App. H7, ¶ 36; Defendants' Statement of Facts, App. I4, ¶ 18) was the Board's Policy on Suspension and Expulsion; however, since A.G. was not a secondary pupil, Policy #529 did not apply to him and therefore he was suspended solely under the authority granted defendant Baumann by Policy #525. Plaintiffs' Statement of Facts, App. H7, ¶ 36. Policy #529 (which per #525 governed secondary school students only) provided that "no student otherwise eligible for attendance at the schools of this district shall be excluded from school unless that student has materially and substantially interfered with the maintenance of good order in the schools." Plaintiffs' Statement of Facts, App. H8, ¶ 37.

Dawn Myatt testified that after the incident involving A.G., she spoke to a Jennifer Micale who was a reporter with the Suburban newspaper. Plaintiffs' Statement of Facts, App. H8, ¶ 39. Myatt admitted that "policy" was discussed with the reporter. Plaintiffs' Statement of Facts, App. H9, ¶ 40. It is documented in the article that Myatt stated "We do have a zero tolerance policy. Mrs. Baumann followed it to a T." Plaintiffs' Statement of Facts, App. H9, ¶ 42. At the time she spoke to the reporter Myatt was not only a school employee but also the "Board of Ed Liaison" for the PTA which position involved "going to the meetings [and] finding out... what the Board is doing and how it affects the students."

Plaintiffs' Statement of Facts, App. H9-H10, ¶ 44. Defendant Bauer spoke to reporters from the Newark Star Ledger about the incident, and testified that he was accurately quoted as saying:

> We have consistently taken every statement, every comment as a serious matter. We will be in the process of reviewing this policy. But given the apparent access to weapons, we still have to take every one of these incidents very seriously.

Plaintiffs' Statement of Facts, App. H10, ¶ 47. According to the article,

> Braced with the criticism, Superintendent William Bauer said officials will examine the district's zero tolerance policy as it relates to children as young as the four kindergartners but he stopped short of calling the suspensions a mistake.

Plaintiffs' Statement of Facts, App. H11, ¶ 49.[2] In interrogatory answers the defendants set forth that: "The March 15, 2000 incident was dealt with in the matter already established with regard to threatening behavior or statements." Plaintiffs' Statement of Facts, App. H11, ¶ 51.

Procedural History.

Petitioners filed their complaint in the United States District

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[2] The reporters who wrote the articles quoting Myatt and Bauer have stated that they will invoke New Jersey's Shield Law and therefore they are unavailable as witnesses. Plaintiffs' Statement of Facts, App. H11, ¶ 50.

Court of New Jersey on June 5, 2000, alleging various causes of action for deprivations of civil liberties under color of state law pursuant to the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1988. *See* App. D (Complaint).

Respondents filed a motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure on December 7, 2001. The District Court granted the motion following oral argument by Order dated April 24, 2002. Timely Notice of Appeal was filed by Petitioners pursuant to FED. R. APP. PROC. 4(a) on May 16, 2002.

The District Court held that under the relevant circumstances the school officials had a justifiable interest to take seriously and punish speech that referred to guns and violence and such interest trumped any free speech rights of petitioners, that Petitioners had been given appropriate due process and that in any event the individual school officials were entitled to qualified immunity.

The Third Circuit Appellate Court summarized its position as follows:

> The Supreme Court has recognized that a balance must be struck between the student's rights and the school's role in fostering what the Court in *Fraser* termed "socially appropriate behavior." *Fraser*, 478 U.S. at 681. Here, where the school officials determined that threats of violence and simulated firearm use were unacceptable, even on the playground, the balance tilts in favor of the school's discretionary decision-making.

S.G. v. Sayreville Board of Ed., 333 F.3d 417 (3rd Cir. 2003)

This petition follows.

REASONS FOR GRANTING THE WRIT

The decision below disrupts the delicate balance between the rights of students and the need of educators to maintain appropriate discipline and order. The Court of Appeals has created, insofar as elementary school students are concerned, an unwarrantedly liberal rational basis test. Under the guise of an "acceptable social behavior" standard, school authorities may suppress through stern punishment constitutionally protected expression so long as they can point to any sort of contemporary events or reasons for their actions, no matter how remote or unrelated. Their leeway to do this even extends to expression which occurs outside of the classroom and during the student's own time such as at recess. Under such a standard the educators in *Tinker* would have prevailed by merely pointing to news footage of rioting war protesters. It is respectfully submitted that this standard should be subjected to review by this Court not only because it conflicts with this Court's precedents but also because the educational community will rapidly embrace this standard with the result that the rights of public school children everywhere will be imperiled.

This case also raises the essential issue of what due process should be afforded a student who because of his tender years would not be able to understand even the most rudimentary of proceedings or the concept that even if one is guilty of a particular act, they still should have an opportunity to plead mitigating circumstances. The jurisprudence is sparse of this issue and guidance is needed as suspensions of younger students is becoming more commonplace.

I. CERTIORARI IS APPROPRIATE TO ADDRESS THE IMPORTANT CONSTITUTIONAL QUESTION WHETHER PUBLIC EDUCATORS VIOLATE THE FIRST AMENDMENT BY PUNISHING THROUGH SUSPENSIONS CHILDREN OF TENDER YEARS FOR ENGAGING IN EXPRESSIVE ACTIVITY WHICH IS NEITHER LEWD NOR DISRUPTIVE, BUT WHICH IN THE SUBJECTIVE VIEW OF THE EDUCATORS CONSTITUTES SOCIALLY INAPPROPRIATE BEHAVIOR.

Generally students have a right to freely express their ideas and views. "Certainly, where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained." *Tinker*, 393 U.S. at 508. In this case the courts below were unable to conclude under the FED. R. CIV. PROC. 56(c) summary judgment standard that the boys' expression had created a material disruption or threat thereof. Thus the boys' expression was protected unless it fell within some other exception.

This Court has recognized only two other exceptions allowing punishment of students' expression in the absence of a "disruption." Educators may prohibit and punish "lewd," "vulgar," "indecent," and "plainly offensive" speech in school. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675. A school may also regulate the "content of student speech in school-sponsored expressive activities as long as [its] actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273.

The *Hazelwood* exception is inapplicable because the

expression was not part of a school-sponsored expressive activity. It occurred during recess. *Accord C.H. v. Oliva*, 226 F.3d 198 (3rd Cir. 2000); *Walz v. Egg Harbor Twp. Board of Educ.*, 2003 U.S. App. LEXIS 18148 (3rd Cir. 2003).

Objectively the *Fraser* standard would appear not to apply in that the expression was not lewd, vulgar, indecent nor plainly offensive speech. The sexual innuendos made by student Fraser twenty years ago were, even by present standards, undoubtedly lewd and vulgar. By the decision below, however, the Court of Appeals has torn *Fraser* from its moorings by embracing the view that what defines "the boundaries of socially appropriate behavior," *Fraser* at 681, is not whether the expression is lewd or plainly offensive but rather what the educators subjectively perceive should be socially appropriate behavior.

In this case the school officials exercised this discretion to determine that any expression referencing guns or violence would not constitute socially acceptable behavior. Such a view of socially inappropriate speech encompasses a child who wishes to discuss deer hunting or expresses a desire to shoot Osama Bin Laden.

Furthermore, the issues of viewpoint discrimination and indoctrination of partisan political viewpoints into impressionable younger students reach a critical point under an elastic standard that gives great leeway to school officials to determine what speech constitutes socially appropriate behavior. The prohibition promulgated by the educators in this case could be used to press an agenda of pacifism at a time American soldiers are being killed in far away lands. Or it could be determined that using the terms hate, evil, fat, ugly, war or even peace is socially inappropriate, depending on the circumstances. Because the potential for mischief

is virtually limitless in a rule of constitutional interpretation that allows local school administrators to reinforce their political biases in the hearts and minds of the community's schoolchildren, certiorari is appropriate to review whether the decision below should be reversed on First Amendment grounds.

II. CERTIORARI IS APPROPRIATE TO ADDRESS THE IMPORTANT CONSTITUTIONAL QUESTION WHAT PROCESS IS DUE STUDENTS OF TENDER YEARS WHERE THERE IS A REASONABLE LIKELIHOOD THAT THEY MAY BE UNABLE TO COMPREHEND THE SIGNIFICANCE OF THE PROCEEDINGS AND THERE EXISTS NO IMMINENT DANGER OF HARM TO EITHER THE STUDENTS OR THIRD PERSONS.

While all intentional governmental deprivations of life, liberty, or property require fair process, what constitutes fair process in terms of the timing and scope of the hearing varies according to the circumstances of the deprivation. The Court will weigh: (1) the importance of the individual interest involved; (2) the value of specific procedural safeguards to that interest; and (3) the governmental interest in fiscal and administrative efficiency. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Education has long been held to be an important interest, so important that legislatures mandate the length of the school year, the courses that are taught, the requirements for graduation, the age a minor must attain before a parent can voluntarily cease the child's education and many other items. Therefore there is a high importance in Petitioner's education.

Children of tender years have long been protected by society. The State has a duty of the highest order to protect the interests of

minor children, particularly those of tender years. *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984). Therefore there is a high value placed upon the specific procedural safeguards.

Finally, the Court must also weigh the governmental interest in fiscal and administrative efficiency. In this case there was no emergency or threat of harm at issue, no third party was threatened and the immediate suspension was only for the convenience of the Respondents because they simply did not want to wait to contact the parents.

In *Goss v. Lopez*, 419 U.S. 565 (1975) the Supreme Court determined that the total exclusion of a child from the educational process for more than a trivial period is a serious event in the life of the suspended child. It was held that

> [D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school."

Goss, 419 U.S. at 581.

In the instant case, Defendant Baumann admitted to A.G.'s parents that the children involved could not comprehend the process. Therefore, it follows that the "hearing" they received was patently inadequate without the presence of their parents. Furthermore, the presence of A.G.'s parents could have made a

difference because they certainly would have pointed out that A.G. was not in school on the day defendant Baumann announced the policy and that they did not receive a copy of her letter of March 10, 2000, and therefore both the minor Petitioner and his parents lacked notice of the prohibited conduct.

Insofar as Respondent's actions violated Petitioner A.G.'s right to procedural due process by providing him with a hearing that they admit he could not comprehend, certiorari is appropriate to review the case in order to clarify how primary school educators are to protect the due process interests of children of tender years.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that their petition be granted, and that certiorari issue to the United States Court of Appeals for the Third Circuit to review the appeals court's decision affirming the dismissal of their lawsuit against Respondents.

Respectfully submitted,

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September 16, 2003

TABLE OF APPENDICES

A. Decision of the Third Circuit Court of Appeals in *S.G. v. Sayreville*, No. 02-2384, 333 F.3d 417 (2003) A1

B. Order of Honorable Katherine S. Hayden, filed April 24, 2002, in *S.G. v. Sayreville*, No. 2:00-CV-02727, USDC Dist. N.J. B1

C. Transcript of Oral Argument before the Honorable Katherine S. Hayden, April 24, 2002, in *S.G. v. Sayreville*, No. 2:00-CV-02727, USDC Dist. N.J. C1

D. Complaint filed June 5, 2000 ..... D1

E. Answer to Complaint filed August 21, 2000 ..... E1

F. Excerpts of Sayreville Board of Education Policy Nos. 525 and 529 (Exhibit H to Defendants' Motion for Summary Judgmednt filed December 3, 2001) F1

G. Plaintiffs' L. Civ. R. 56.1 Statement of Material Facts G1

H. Defendants' Statement of Facts Pursuant to L. Civ. R. 56.1 ..... H1

I. Letters of March 15, 2000 (Exhibit I to Defendants' Motion for Summary Judgment filed December 3, 2001) I1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2384

S.G., as Guardian ad Litem of
A.G. a minor and individually,
Appellant

v.

SAYREVILLE BOARD OF EDUCATION;
GEORGIA B. BAUMANN; WILLIAM L. BAUER
Appellee

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 00-cv-02727)
District Judge: Hon. Katharine S. Hayden

Argued February 3, 2003
Before: SLOVITER, RENDELL and STAPLETON,
Circuit Judges

(Filed: June 19, 2003)

F. Michael Daily, Jr. (Argued)
Quinlan, Dunne & Daily

Merchantville, N.J. 08109-2619

Attorney for Appellant

Sean X. Kelly (Argued)
Marks, O'Neill, O'Brien & Courtney
Pennsauken, N.J. 08110

Attorney for Appellees

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

In this civil rights action brought pursuant to 42 U.S.C.§ 1983, S.G., father of A.G., a kindergarten student in the Sayreville, New Jersey Public School System, claims that the Sayreville Board of Education, the Superintendent of Schools and the principal of the school that A.G. attended (jointly referred to as "School Defendants") violated A.G.'s constitutional rights to freedom of speech, procedural due process and equal protection by suspending him from school for uttering the statement "I'm going to shoot you" to his friends while they were playing at recess in the school yard. The District Court granted summary judgment in favor of the School Defendants. This appeal followed.

I.

BACKGROUND

A.G. was a five-year old, kindergarten student at the Wilson Elementary School in Sayreville, New Jersey, at the time in question. Three incidents at the school in early March 2000 provide the context of the events that are the basis of this suit. On March 4,

2000, a student told other children that he intended to shoot a teacher. In an unrelated incident the same day, another student told a classmate that he would put a gun in the classmate's mouth and kill him. On March 10, 2000, a student told another that his mother allowed him to bring guns to school. The students making these statements were each suspended for three days. The students involved in the first two incidents also met with the school psychologist, and the school recommended outside psychological counseling to their parents. The second incident was also reported to the police.

On March 10, 2000, the school principal, Georgia Baumann, visited each class and discussed the seriousness of making statements threatening harm with a weapon. She sent a letter home with each student asking parents to discuss the issue with their children and stating that immediate disciplinary action would be taken when students make statements referring to violence or weapons. A.G. was absent on March 10 and his parents did not receive Baumann's letter. On March 15, 2000, A.G. and three other students made statements referring to weapons and shooting each other at recess. According to A.G., he was playing a game of cops and robbers with his friends and said, "I'm going to shoot you." App. at 157. Another student told a teacher what A.G. and his friends were doing,[1] and that teacher reported that some of the students were upset. The teacher took the boys to Baumann's office.

Baumann asked A.G. and his friends what had occurred and they told her that they were "playing guns." App. at 64. The parties dispute the extent to which the boys' actions affected other children. Baumann testified that she spoke to children who were in the vicinity and they told her that they were frightened and upset. A.G.

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[1] Appellant's characterization of the student as a "tattle tale," Appellants' Br. at 22, does nothing to further the necessary analysis.

testified that the only child who was watching them was the one who told the teacher what they were doing. Baumann suspended the students for three days after notifying then-Assistant Superintendent Dennis Fyffe and Superintendent William Bauer. When Baumann was unable to reach A.G.'s parents by telephone, she contacted his grandmother about the incident and sent a letter home with A.G. informing his parents about the suspension.

A.G.'s father, S.G., contacted Superintendent Bauer who told S.G. that "policy was policy" and that he had to stand behind Baumann's decision. App. at 138. A.G. served the three day suspension, returned to school and finished the school year. A.G.'s suspension is not part of his permanent scholastic record, but Baumann has a record of it in a personal file she retains which she would be free to share with the principal of another school, but she has never been asked to do so.

S.G. filed this action on behalf of A.G. against the Sayreville Board of Education, Baumann and Bauer pursuant to 42 U.S.C. § 1983 claiming that A.G. was denied his constitutional rights to free speech, procedural due process and equal protection of law. After discovery, the School Defendants moved for summary judgment, and the individual defendants Baumann and Bauer asserted that they are entitled to qualified immunity.

The District Court held a hearing on the motion, and then granted the summary judgment motion. The Court examined the school's conduct in the context of its announced intention to take seriously speech that refers to guns and violence, and in light of the school's heightened concerns about the problem of guns and violence on school premises. The Court held that Baumann's response "was reasonable and within in [sic] her authority and did not implicate any fundamental constitutional rights that A.G. could assert in that context." App. at 272. The District Court further

concluded as a "fall back" that Baumann is entitled to qualified immunity because she did not violate A.G.'s clearly established constitutional rights. App. at 275. S.G. appeals.

II.

JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. This court has jurisdiction pursuant to 28 U.S.C. § 1291. We review an order granting summary judgment de novo, applying the same standard used by the District Court. *Nicini v. Morra*, 212 F.3d 798, 805 (3d Cir. 2000) (*en banc*).[2]

III.

DISCUSSION

Section 1983 imposes civil liability upon any person who, under color of state law, deprives another person of any rights, privileges, or immunities secured by the Constitution or laws of the United States. 42 U.S.C. § 1983. When an individual defendant in a § 1983 action claims s/he is entitled to qualified immunity, "our first task is to assess whether the plaintiff's allegations are sufficient to establish the violation of a constitutional or statutory right at all." *Gruenke v. Seip*, 225 F.3d 290, 298 (3d Cir. 2000). If the plaintiff's allegations meet this threshold, "we must next determine whether, as a legal matter, the right that the defendant's conduct allegedly violates was a clearly established one, about which a reasonable person would have known." *Id.* If so, then the

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[2] Under Fed. R. Civ. P. 56(c), summary judgment is warranted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affadavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

defendant is not entitled to qualified immunity. *Id.* If the plaintiff's allegations fail to satisfy either inquiry, then the defendant is entitled to summary judgment. *Id.* Until the question of qualified immunity is addressed, a court cannot reach the underlying merits of the case. *Id.* At 298-99.

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court explained why the first inquiry must be whether a constitutional right would have been violated on the facts alleged:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the [defendant's] conduct was unlawful in the circumstances of the case.

Id. at 201. The Supreme Court had previously stated that this order of procedure is designed to "'spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.'" *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). We therefore proceed first to consider whether S.G. has alleged facts sufficient to establish the violation of a constitutional right. If so, we will then consider whether the right allegedly violated was "clearly established."

A. *First Amendment*

S.G. argues that A.G. was deprived of his First Amendment right to freedom of speech when he was suspended from school for saying "I'm going to shoot you" to a friend at recess. He contends that the boys were playing a game, that they did not threaten physical harm and that they did not substantially disrupt school operations or interfere with the rights of others.

It has been established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This does not mean that students are free of any regulation of their speech. The Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507.

In *Tinker*, the Court was presented with the First Amendment claim of two high school students and one junior high student who were suspended for wearing black armbands to school to show their objections to the Vietnam war. In holding that school officials violated the students' First Amendment rights, the Court emphasized that the school officials banned and sought to punish the students for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on their part. *Id.* at 508. The Court made clear that school officials may not prohibit a particular expression of opinion because of their "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. Students cannot be punished for merely expressing their personal views on the school premises unless "school authorities ha[ve] reason to anticipate that [such expression will] substantially interfere with the work of the school or impinge upon the rights of other students." *Id.*

On the other hand, First Amendment protection for students' speech is not unlimited, as made clear in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). In that case, a high school student delivered a speech nominating a fellow student for a student elective office, and referred to his candidate in terms of an elaborate, graphic and explicit sexual metaphor. The school suspended the student for violating the high school's rule prohibiting the use of obscene language in the school, and the student, in a suit filed by his father as guardian ad litem, claimed the suspension violated his First Amendment right to freedom of speech.

In holding that the school district acted within its permissible authority in imposing sanctions upon the student, the Court enunciated a principle equally applicable to the case before us when it stated, "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681. It then stated, "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," and that the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id.* at 683. It pointed out that, "[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in [*Fraser*] were unrelated to any political viewpoint." *Id.* at 685.

Moreover, the "First Amendment guarantees wide freedom in matters of *adult* public discourse," *Id.* at 682 (emphasis added), but "[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school." *Id.* The Court

recognized that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. *Id.*

The *Fraser* decision was relied upon by the majority in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), where the Court rejected a First Amendment challenge to the high school principal's deletion of two pages in the school newspaper. The principal objected to stories that described three students' experiences with pregnancy because he was concerned that the students might be identifiable and that the subject matter was inappropriate for younger students at the school, and he objected to a story that discussed the impact of divorce on students at the school because he believed that the students' parents should have been given the opportunity to respond or consent to the publication.

In concluding, over a vigorous dissent, that school officials had not violated the students' First Amendment rights, the Court, citing *Fraser*, recognized that a "school need not tolerate student speech that is inconsistent with its 'basic educational mission,' []even though the government could not censor similar speech outside the school." *Id.* at 266. Because the school officials had not intended to create a public forum, they were entitled to regulate the contents of the newspaper in any reasonable manner. *Id.* at 270.

Guided by these Supreme Court decisions focusing on the speech rights of students in a school setting, we conclude that the facts alleged by S.G., even if true, do not establish a violation of A.G.'s First Amendment rights. The Supreme Court has recognized that a balance must be struck between the student's rights and the school's role in fostering what the Court in *Fraser* termed "socially appropriate behavior." *Fraser*, 478 U.S. at 681. Here, where the school officials determined that threats of violence and simulated firearm use were unacceptable, even on the

playground, the balance tilts in favor of the school's discretionary decision-making. S.G. attempts to ratchet up the school's rule forbidding speech referring to weapons or violence to the level of "core" political speech. He then suggests that the policy at issue is overbroad and offends the First Amendment. This argument is tenuous. There is nothing in the record that even suggests that A.G. and his schoolmates playing cops and robbers were making a political statement about the value of guns in schools.

S.G. argues that under this court's decision in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001), student speech can be regulated only if it would substantially disrupt school operations or interfere with the rights of others. In *Saxe*, the students challenged the constitutionality of the school district's anti-harassment policy which provided that harassment can include any unwelcome verbal, written or physical contact which offends, denigrates or belittles an individual on various grounds, including, *inter alia*, one's sexual orientation. The students believed that homosexuality is a sin and feared that if they spoke out, they would be punished under the anti-harassment policy.

We agreed with the students that the policy offended the First Amendment. We explained that content- or viewpoint-based restrictions are subject to the most exacting First Amendment scrutiny, and the government may not prohibit the expression of an idea because it is offensive or disagreeable. *Id.* at 207-209. We held that the school district's anti-harassment policy went beyond the permissible restrictions on student speech under *Tinker* and its progeny, and was unconstitutionally overbroad. *Id.* at 216-217. *See also Sypniewski v. Warren Hills Reg'l Bd. Of Educ.*, 307 F.3d 243 (3d Cir. 2002) (district court should have granted an injunction against enforcement of a school's racial harassment policy to ban a t-shirt targeted for its expressive content). Unlike

Tinker or *Saxe*, this case does not involve the regulation of expressive speech and thus neither of those cases applies here.

Moreover, none of the cases discussed above involved a school's restriction of a kindergartner's speech. Indeed, one Court of Appeals has stated that it is unlikely that *Tinker* and its progeny apply to elementary school students. *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1539 (7th Cir. 1996).

In a recent decision, this court has noted that:

> any analysis of the students' rights to expression on the one hand, and of schools' need to control behavior and foster an environment conducive to learning on the other, must necessarily take into account the age and maturity of the student.

Walker-Serrano v. Leonard, 325 F.3d 412, 416 (3d Cir. 2003). Various cases have held that "[a]ge is a critical factor in student speech cases." *Muller*, 98 F.3d at 1538; *see also Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 738 (7t h Cir. 1994) ("age *is* a relevant factor in assessing *the extent* of a student's free speech rights in school"). As we stated in *Walker-Serrano*, "[t]he significance of age in this inquiry has called into question the appropriateness of employing the *Tinker* framework to assess the constitutionality of restrictions on the expression of elementary school students." *Id.* at 325 F.3d at 416. *See also Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 296 (E.D.Pa. 1991) (noting the "impressionability" of children at elementary school level).

We need not decide in this case whether or if, under what circumstances, a school may violate an elementary school student's right to freedom of speech. For our purposes, it is enough to recognize that a school's authority to control student speech in an

elementary school setting is undoubtedly greater than in a high school setting. *See Fraser*, 478 U.S. at 683 (discussing the damaging nature of a student's speech on its less mature audience). As this court stated recently, "[t]here can be little doubt that speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students." *Walker-Serrano*, 325 F.2d at 416-17.

Returning to the issue of defendants' entitlement to qualified immunity, we hold that the school's prohibition of speech threatening violence and the use of firearms was a legitimate decision relate to reasonable pedagogical concerns and therefore did not violate A.G.'s First Amendment rights. In any event, defendants are entitled to qualified immunity because there was no clearly established law to the contrary. Like the vulgar language in *Fraser*, school officials could reasonably believe they were acting within the scope of their permissible authority in deciding that the use of threatening language at school undermines the school's basic educational mission, particularly because the incident in Sayreville was only two weeks after the widely reported fatal shooting of a six-year-old child by another six-year-old child at an elementary school in Flint, Michigan. Although S.G. argues that the boys were only playing a game, the determination of what manner of speech is inappropriate properly rests with the school officials. We therefore hold that the School officials did not act contrary to any established law.

B. *Procedural Due Process*

S.G. also argues that A.G.'s procedural due process rights were violated because neither S.G. nor his wife was present when Baumann met with A.G. before his suspension. S.G. contends that A.G. did not understand the process, that he or his wife could have explained that A.G. was not in school when Baumann discussed the

issue of weapons and violence with the students, and that they did not receive her letter to parents.

The requirements of procedural due process for suspension of students were set forth in *Goss v. Lopez*, 419 U.S. 565 (1975). In that case, the Supreme Court held that high school students were denied due process of law when they were suspended for misconduct without a hearing. The Court stated that a student has a "legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." *Id.* at 574. In addition, because the suspensions could damage the students' standing with other students and their teachers, and interfere with later opportunities for higher education and employment, the Court believed that the students' liberty interest in their reputation was also implicated. *Id.* at 574-75.

The Supreme Court concluded that a student facing a suspension of ten days or less must be given oral or written notice of the charges against him or her and a student who denies the charges must be given an explanation of the evidence the authorities have and an opportunity to present his or her side of the story. *Id.* at 581. There need be no delay between the time the notice is given and the time of the hearing. *Id.* at 582. In the majority of cases, "the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred." *Id.*

The record here reflects that Baumann met with A.G. and his friends before imposing his suspension. Contrary to S.G.'s argument, the record does not reflect that A.G. did not understand the meeting with Baumann. Baumann had sought to inform A.G.'s parents, but her inability to reach them does not signify that A.G. was deprived of procedural due process. She asked each of the

boys to explain to her what he had said and done. The boys admitted that they were "playing guns," App. At 64, and that they had made statements regarding shooting a gun. That discussion fulfilled the requirements of due process which can be satisfied in a case like this by informal procedure.

C. *Equal Protection*

S.G.'s third constitutional claim is that A.G.'s suspension violated his right to equal protection because it was imposed solely because of school policy and lacked a rational basis. Assuming arguendo that there was a policy established by the principal that the school had a zero tolerance policy for threats of violence and students who made threats or statements referring to weapons would be punished and receive suspensions, here for three days, there was no clearly established law holding that such a policy was irrational. Nor do we see any equal protection violation.

In *Palmer v. Merluzzi*, 868 F.2d 90 (3d Cir. 1989), this court considered whether a suspension from participation in interscholastic sports because of drug use violated a student's right to equal protection. Applying a rational relationship test, we concluded that the school's disciplinary action was rationally related to a valid state interest in preserving a drug-free environment in the schools and discouraging drug use by its students. *Id.* at 96. Here also, the school's disciplinary action of short three day suspensions for threats of violence and similar gun play was rationally related to the valid state interest in controlling student conduct in light of the shootings at other schools nationwide and the recent incidents at A.G.'s school involving threats of violence. It was not unreasonable for the principal to seek to avoid conduct which has the capacity to interfere with the orderly conduct of the school and other children's right to be secure.

S.G.'s reliance on *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000), is misplaced. In that case, it was for the trier of fact to decide whether the expulsion of a high school student who unknowingly possessed a weapon was rationally related to a legitimate state interest. *Id.* at 579-80, or, if not, whether the school violated the student's substantive due process rights. Unlike the situation in *Seal*, A.G. had knowledge of the underlying conduct for which he was sanctioned.

Because S.G.'s allegations are insufficient to establish a violation of A.G.'s constitutional rights to freedom of speech, procedural due process or equal protection,[3] and because there is no clearly established law to the contrary, we will affirm the District Court's grant of qualified immunity.[4]

IV.

CONCLUSION

For the reasons discussed above, we will affirm the judgment of the District Court.

A True Copy:

Teste:

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[3] Having concluded that S.G. has not alleged a constitutional claim against the individual Appellees, we need not address his claims against the Board of Education. These claims are not based upon any action by the Board but rather upon its acquiescence in an alleged policy promulgated and enforced by Bauer and Baumann that violated A.G.'s constitutional rights.

[4] S.G. seeks injunctive relief to prevent the principal from retaining any informal record of A.G.'s suspension in her personal notes. Because such an informal record does not violate any of A.G.'s constitutional rights, he is not entitled to an order expunging it.

Clerk of the United States Court of Appeals for the Third Circuit

B1

UNITED STATES DISTRICT COURT
NEWARK VICINAGE

S.G. as Guardian ad litem for A.G., a minor and individually,	CIVIL CASE NO. 2:00CV02727

Plaintiff

vs.

Sayreville Board of Education,
Georgia B. Baumann
and William Bauer

Defendants.

ORDER

THIS MATTER having been submitted to the Court by Marks, O'Neill, O'Brien & Courtney, P.C., attorneys for defendant, Sayreville Board of Education, Georgia B. Baumann and William Bauer, pursuant to R.1:6-2, and the Court having reviewed the moving papers and supporting Brief, and the oral arguments of counsel, and for GOOD CAUSE having been shown;

It is on this 24th day of April of 2002; ORDERED and DECREED that Summary Judgment be and is hereby GRANTED in favor of defendant, Sayreville Board of Education, Georgia B. Baumann and William Bauer, dismissing plaintiff's Complaint and

any and all crossclaims filed against the defendant with prejudice.

KATHARINE S. HAYDEN
J.D.N.J

C1

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO. 00-2727
S.G., as Guardian ad Litem for A.G.
Plaintiff,

-vs-

SAYREVILLE BOARD OF EDUCATION, et al:

Defendants

MOTIONS
Newark, New Jersey
April 24, 2002 10 a.m.

Before: The Honorable Katharine S. Hayden, U.S.D.J.

Appearances:

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Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

/S/ Ralph F. Florio
Official Court Reporter

THE COURT: Good morning. We are here in the matter of S.G. versus the Sayreville School District, which is a case amounting to a constitutional challenge on behalf of an infant, a first grader named A.G., S.G. is the mom, I guess, yes?

MR. DAILY: Yes.

THE COURT: Regarding a three-day suspension imposed on A.G. for statements that he made in the school yard during recess.

The specific constitutional claims asserted on his behalf are his First Amendment Free Speech Rights and his rights under the Fourteenth Amendment to due process and equal protection. And I understand that the Eighth Amendment claim is being withdrawn. Is that correct, Mr. Daily?

MR. DAILY: Yes, your Honor.

THE COURT: Okay. One thing, and I am telling you this after the cows flew out of the barn, but it is important that lawyers be aware of it. In my Local Rules Appendix, I've asked when claims are withdrawn in motions, legal arguments are not going to be pressed, a separate letter goes to us saying we're going to be filing this and that or - whatever, just so we're kind of alerted

through the correspondence as opposed to reading stuff that we're not going to have to deal with the Eighth Amendment claim. And that could be sent separately or at the time that the brief is being filed. But that way when we pick up the papers we don't have to pay any attention, as it were, to the affirmative arguments made by the defendant on the Eighth Amendment because we know the defendant is abandoning them and we don't have to do it. This kind of saves the few brain cells that we have available for the many cases that we deal with.

All right. What I would like to do because I am familiar with the briefing in this case as opposed to making Mr. Kelly go through his stuff, specifically question you, Mr. Daily, on exactly where the constitutional wrong is in connection with what the school did. Okay?

So if you come up to the podium, I'd like to go claim by claim by claim. And I guess a good way to get into this in terms of the family, as it were, is relying for constitutional protections in conjunction with a zero tolerance policy that they allege the principal and arguably the school as well was enforcing. A policy that I gather would operate so that irrespective of contexts or whatever, certain expression or certain words, certain speech was absolutely forbidden. And based upon that, their claims arise under various constitutional tests.

Is that an accurate statement versus the written policy that is attached to the record in this case?

MR. DAILY: Yes.

THE COURT: Okay. What's the factual basis for the claim that this school principal and her school and the school board had adopted and was enforcing a zero tolerance policy?

MR. DAILY: The basis for that is a number of sources. First, there was the statement of the Superintendent of Schools. When questioned by the father as to why this was done, he said

policy is policy, it has to be done.

There was the conversation at the return meeting for the child to be readmitted when the mother asked, what's the child going to be gaining from all of this? And she said, really nothing, he doesn't understand it. And eluded to a zero tolerance policy as being what was in force.

There's the statement now disowned by the PTA liaison person, Meyer, that they have a zero tolerance policy and the principal followed it to the T.

There's the empirical evidence that there were three other incidents of differing context and in each one of those incidents the same penalty was imposed: three days. Three days. Three days. Three days.

The answers to interrogatories the defendants stated that the penalty imposed was consistent with the custom that had been imposed prior, which was the three days.

So we assert that a-fair-minded jury could disbelieve the defendant's claims that he didn't have such a policy and take the information that has been supplied and conclude that Principal Baumann with the authority of Superintendent Bauer had under the written policies that vested in elementary school building principals the right to set disciplinary policies and the right to set what disciplinary policies and the right to set what penalties were there on those policies that she in fact established this policy. And that the fact that it is in writing does not mean that they can be – that they didn't have such a policy and that it was formal in nature.

THE COURT: But the fact that it wasn't in writing.

MR. DAILY: That's correct.

THE COURT: Now, let's look at that expression of what the elementary teachers could do and not do in the written policy because I understand more clearly where this is fitting in on a factual basis.

It appears in Tab H of the defendant's brief: Student Discipline, Student Conduct. And the next to last paragraph indicates: Disruptive pupils in the elementary grades will be reported to the building principal who may discipline the people in accordance with his policy; is that the genesis?

MR. DAILY: Yes. And Principal Baumann at her deposition said that that reference to this policy is in fact that very section. And then if you look higher in the section, you will see at further up where authority is vested in the building – in the building principals to set the standards of discipline and penalties.

THE COURT: Okay. Now bear with me, because I believe that the only proper way to deal with constitutional standards is to get very rigorous and disciplined about where the constitutional right lies and how the state actor is in fact treading on the constitutional boundaries improperly, or not.

This policy number 525 in Tab H deals with student discipline and student conduct. It begins with an acknowledgment, "The Board of Education acknowledges that conduct is closely related to learning and that an effective instructional program requires an orderly school environment," and so on. And then gives notice of what it expects. And there are eight subparagraphs as to that. And then on second page sets forth the belief, "That the pupils of this district are entitled to an education free from undue disruption. Pupils who willfully disrupt the educational program shall be subject to the discipline procedures of this district. Every reasonable effort shall be made to determine and remediate the cause or causes who chronically disrupt the pupils' unacceptable conduct." And we've already quoted from that next to last paragraph as to disruptive pupils in the elementary phases.

Now, I believe in addressing this moved from – or maybe we haven't, tell me where the First amendment claim - sits in the contents of this analysis. Because my understanding of the First

Amendment is that we're talking about free speech. And if I get very basis, I am allowed to say whatever I want, whenever I want, wherever I want, because I am an American. No. Right?

MR. DAILY: Obviously not.

THE COURT: I'm allowed to say whatever I want, wherever I want if I am on a school grounds and we know that's a no.

Where is this zero tolerance policy examined in the contexts of a disciplinary response that's set forth in policy number 525?

MR. DAILY: Well –

THE COURT: How do we analyze it for purposes of –

MR. DAILY: First of all, I am arguing that policy 525 is only part of the picture. It is 525, as implemented with the unwritten guidelines that were promulgated by Ms. Baumann with the authority of the Superintendent.

THE COURT: Right.

MR. DAILY: Now, I understand your Honor's question to be where is the causal link between that policy and the injury, the constitutional violation to A.G. My response is, that –

THE COURT: Right.

MR. DAILY: That the First Amendment covers both speech and expression.

THE COURT: Yes.

MR. DAILY: That when the children of those tender years play games on the school yard that that is in fact a form of expression that they're making.

THE COURT: So we are saying then that the game and the statement complained of, "I have a bazooka and I'm going to kill you," – am I accurate, that is the statement?

MR. DAILY: In the context of children playing cops and robbers and some people are playing the forces of good and some people are playing the forces of evil, yes, my argument is children

have expressed themselves in that way for eons.

THE COURT: Okay. And that is a First Amendment exercise, right?

MR. DAILY: Well, my first – taking it step by step.

My first argument is that constitutes speech and it constitutes expression. Now whether or not the interest of the state maybe imposed to limit that speech or to punish that speech depends upon the context of the speech.

The reason that crime of crying fire, fire, in a crowded theater is not given protection is because of the context. In this context the children were playing a make believe game of cops and robbers. Although Principal Baumann attempts to distance herself from the context by claiming at deposition that she didn't even understand what the game of cops and robbers was, the point of the matter is he was unmasked by the testimony of Superintendent Bauer when he says, when she called and reported the incident to him, she related that the children were playing cops and robbers.

So my argument is that in the context of this speech, the speech was protected. The state did not have an interest in taking the punitive action that it took against A.G. and his playmates. And that it was not disruptive to the educational process. That because – or that's a factual issue. Because they claim that there were the screaming, crying students that were created by this and we say that is not the case. And that a jury under these circumstances a jury could disbelieve that.

THE COURT: Okay. Let me hold that thought for a moment. Let me frame it –

MR. DAILY: I am sorry –

THE COURT: Let me frame it for a minute.

The issue that we frame is that the activity that was going on was a child A.G. playing cops and robbers and making certain statements in the context of that game on school property at recess.

The issue becomes whether or not the state can bring to bear any regulations and even discipline as a result of that exercise and activity on the part of A.G., correct?

MR. DAILY: Yes.

THE COURT: Standing alone, leaving that one alone and analyzing the same thing, adding now the disciplinary measures and actual discipline, because we have got to broaden it for due process purposes. Let's just take the same thing. Kids playing cops and robbers during recess, school yard, where do we go from there in the due process context?

MR. DAILY: Okay, in the due process contexts, assuming that the state had the right to take punitive action against A.G., they subjected him to what I assert and what I believe a fair minded jury would find was a very significant penalty: The three-day suspicion of a kindergarten student in the admission of Superintendent Bauer and the present Superintendent, they admitted they never even heard of a child in that status ever being suspended, let alone being suspended for three days.

So we could conclude that this is significant. Even if it constitutes that his original conduct was grounds for taking the punitive action against him. The Supreme Court has said due process is – in Comer versus Gilbert, due process is flexible, it depends upon the circumstances.

The most basic due process is basically that the person who is being subjected to a potential penalty be given two things: An explanation of exactly they did wrong and their opportunity to tell their side of the story in some sort of meaningful way.

The due process problem here, which is highlighted by Principal Baumann's statement that the children didn't have a way of comprehending what was going on is, how could they be given a meaningful opportunity if they didn't understand what was going on. And in A.G.'s case this was more than a philosophical

argument because Principal Baumann had given lectures to every class about this area of potential misconduct. A.G. wasn't there that day. A.G. didn't get the letter to take home to his parents for his parents to explain this policy that was going to be strictly implemented.

THE COURT: So you're saying that because of the special circumstances of arguably no notice about this and skipping over the issue of admissability of permissible, we are now assuming it is permissible. Because no notice was given to A.G. or his parents he could not be punished at all, all he could do is be warned, don't do it, here's a letter?

MR. DAILY: No, I don't take that position.

THE COURT: First of all, what are saying?

MR. DAILY: First of all, my position is assuming what he did was wrong, that under these circumstances a meaningful hearing had to be with his parents.

THE COURT: Okay. That's probably true even if he sat through a lecture, a movie and was given a pamphlet, correct?

MR. DAILY: Yes. Where the factor comes in as to him not – as to him not having notice, is my understanding is there has been statements in the cases that say you have to show that if he had been given the opportunity that maybe there would have been a different result. Okay. This wouldn't have been a matter of him again just saying I'm guilty. Okay. What would have happened if the parents were there and Principal Baumann said, well, last Friday I went through this with these children, okay. I spoke to his class. The parents would say he wasn't there. There may have been a different decisionmaking. That's why I am saying is that one, the hearing to begin with wasn't meaningful. And, two, there was a substantial likelihood of a detriment to him by not having that hearing. Because additional information could have been brought to bear, or could have been brought to the attention before the

penalty was imposed.

THE COURT: Let me ask you something. Are you in making this point, are you saying that the regulating – no, that's is not a fair question because we have leaped over that. We are assuming for purposes of a due process argument that regulating and punishing that kind of a conduct is permissible, and I was going to ask you about that. That's not fair.

MR. DAILY: Yes.

THE COURT: Okay. That I would assume is the procedural due process claim.

MR. DAILY: Yes.

THE COURT: What is the substantive due process claim?

MR. DAILY: The substantive due process claim is – has a link with the First Amendment claim that arises out of it.

My view is that the fundamental flaw in the policy was that it did not take into account contents. For instance, in a context, as I previously said, is very important in the free speech cases. For instance, in the case – the Tenth Circuit case the West versus Derby Unified School District that the defense heavily relies upon, it's quite clear that the Tenth Circuit's decision was bottomed upon context of the speech.

A Confederate Flag is clearly a – in many quarters a political statement. If you just looked at the speech that was involved in that case you would say how could you ban such speech, it is just very close to core speech.

The point was that in the context of the racial strife that was occurring in that school district that that speech could be regulated, could be regulated by the school authorities.

So the converse of that is when you pass a policy that doesn't take into account context, what you end up with is, you end up with an irrational based decisions. Because they are irrational and because they have no basis in fact they then represent a

violation of Equal Protection. Because the Supreme Court has said that when a governmental entity proceeds irrationally against a single person, they as a class of one can assert a violation of Equal Protection.

THE COURT: You are sliding into the Equal Protection argument?

MR. DAILY: Yes.

THE COURT: Don't slide. Stick to the substantive due process.

MR. DAILY: I am sorry. Yes, your Honor.

The substantive due process argument, and I will concede it is a scant argument, because the Supreme Court has said we have to strictly control substantive due process, otherwise courts become super legislators. And we can't do that. Substantive due process has to be something that has been recognized before. And I am basically arguing that this, what occurred here was something that is so shocking to the court and such that it shocks the conscience of the court and that it qualifies.

THE COURT: Can we withdraw that one?

MR. DAILY: I virtually have – haven't I?

THE COURT: Let me put it out of its misery. I won't ask you to do the legal injection. I will.

The problem that I have with it is almost – is a very academic one in this context. On the other hand, to analyze substantive due process in this context, we would have to find some kind of a fundamental liberty interests that we don't really have under the cases. Even if we were to find it, the standard that we use under the classic test would have to be that the policy was so arbitrary as to shock the conscience of the court. And what he when we're talking schools, discipline, regulations, school yards, etc., I think that we just can't get there no matter how much we stretch.

I think that the substantive due process claim fails mainly because of the context that we are in, which is the school and the general rubric of the cases, which is you don't shed all rights at the door, you still keep some and so on. Which is almost anathetical to a substantive due process claim.

Put another way, I think you've got enough constitutional frame work going for this kind of lawsuit. You don't need it. And it tends to be one of those catchall I am dying, so I'm going to yell about substantive due process type arguments, which I don't think you have here. The issue is under the more classic approaches than substantive due process: Does A.G. have a claim?

Now let's move back to the answer you were giving me which sounds like it was your Equal Protection one?

MR. DAILY: Yes. I confused the clauses of the Fourteenth Amendment.

THE COURT: Okay. So you're saying that the fundamental flaw in the policy is it did not consider context. In failing to consider context it became arbitrary and not rationally based to anything. And then we use that problem to back into as it were an Equal Protection claim?

MR. DAILY: Yes.

THE COURT: And A.G. becomes symbolic of all students who are being hemmed in. And we don't have to look at whether or not he is a protected class. He can in fact be that one person representative.

MR. DAILY: Yes. I'm going on the least level of scrutiny.

THE COURT: Okay. Having covered those, let's go back to the pure analysis of the Free Speech First Amendment claim, which is children playing cops and robbers in a school yard making a statement in the context of their game, in the course of their game, "I have a bazooka and I'm going to kill you." Are doing something that is entitled to the protection of the First

Amendment and without more, the school cannot regulate or discipline.

Is that the Free Speech argument?

MR. DAILY: Specifically without some evidence of disruption of the educational process. Because this occurred on the student's own time and it occurred at recess. This doesn't fall under Hazelwood where it's speech that would occur in a classroom that would be responsive to a project and therefore the school could make a claim that because it was done under the supervision of a teacher that it was speech which could have been confused with the school's position or that somebody could have felt that the school was adopting.

THE COURT: In using the policy 525 as the genesis for the principal's actions, she was employing her authority under 525 to impose discipline.

We've already leaped into an assumption that the activity was disruptive. And your position is there's a factual dispute about its disruptiveness. Which that of course breaks the chain of Baumann's authority at all. And she becomes a state actor who is swooping down on – for this analysis, for summary judgment, take away the factual dispute, we'll give you, there is no proof of any disruption at all.

We're then saying that Baumann, the school, everybody can't act that until there is something that happened as a result of the child's statements, they must tolerate the child's statements. Is that a fair way of saying when we push to the wall the Free Speech claim?

MR. DAILY: In this context I must state that the child's statements if the child went up to somebody who wasn't playing in the game and the child thought it would be a joke to say to another kid, "I've got a bazooka, I'm going to shoot you," that would be a different context of a different matter.

THE COURT: Let's analyze that one. A kid standing in the school yard walks up to a child just standing there and says, "I have a bazooka and I am going to kill you." Can in fact there be any regulations of that speech leading to discipline?

MR. DAILY: I believe – I believe that there can. I don't think it could be – would be wise because children walk around all the time saying to each other I'm going to kill you. Okay. But if school officials want to be that foolish, it's their school.

THE COURT: Okay. Then I think that, and you have been very helpful, Mr. Daily, and I really appreciate it. I think I have now the frame work for where I want to hear from the defendants as to their reactions to these two scenarios. As it were totally unprovoked, lack of context, clear walking up to somebody and saying I have a bazooka and I am going to kill you. Versus, as the plaintiff has been very careful both in an argument now and in a brief, to place the statement which is in the course of a cops and robbers game. And the very natural expression in the course of a cops and robbers game.

MR. DAILY: Your Honor, there was one other point that I wanted to make. And that is, I assert that the letter that Principal Baumann sent home, established the policy that you know, any reference regardless of contexts is going to be grounds for discipline.

Superintendent Bauer, I assert that she had her authority to promulgate that policy. And I also assert that Superintendent Bauer has in depositions indicated that such a letter sent home he would have seen and approved before it went home.

To the extent, your Honor, I got an indication from some of your comments, that Baumann may have been acting – exceeding her authority or acting in some sort of roguish fashion, I don't think she was.

THE COURT: I didn't mean to have you do that. I gather

from her last colloquy of her making that statement in the letter and expressing that intention with respect to speech, is not what's being challenged. It's the use of an expression that arguably fell within Baumann's four corners in the context of cops and robbers, that's the objectionable constitutionally raised issue, correct?

MR. DAILY: Yes.

THE COURT: Mr. Daily has been every helpful, Mr. Kelly, about absolutely zeroing in and that's where I wanted to hear from the school. Okay.

MR. KELLY: You want me to start with the context based analysis in term of the First Amendment?

THE COURT: Don't even go into the academics of everything that we've have been going through. No pun intended. Just exactly where the constitutional issues arise or don't arise in terms of the authority of the school to impose discipline and regulate content of speech and so on, where kids are playing cops and robbers and an otherwise forbidden statement. I have a gun and I'm going to shoot you is uttered by a kid in the context of a game of cops and robbers.

MR. KELLY: Very well. I think that once we get to the point where we are arguing that there is a contextual distinction, that is this was cops and robbers, I didn't mean it. that's inherent in that argument, isn't it? Let's be honest. But if the characterization that the plaintiffs are putting on it, it is not in fact the characterization that prompted the action by my client. That is the facts of this case are that a threat to shoot, which you are familiar with was made from one child to another. That it was overheard by another child. That it was brought to the attention of a teacher and ultimately to the principal.

So that's one context.

THE COURT: All right. But Mr. Daily says let's use common sense. The person who raised the – or who said A.G. just

said this was not at least from the most bloodless interpretation of the incident, fleeing for her life, but rather reporting the content of what A.G. said. And Mr. Daily says the record ultimately has the principal admitting that she knew it was in the context of a cops and robbers game.

So we're still within the responsible of the school knowing that it is cops and robbers, and I didn't mean it when they start evaluating what to do with A.G.

MR. KELLY: That's right. And I think that's once we get to that point where we know that the school is in a position where they have to evaluate conduct, we are then in the almost sacro sync area where the Supreme Court has told us that we are now in an area where we should not invade the province of a principal. Depending of course to the punishment that is given out. And we know we are in that constitutional area and we are dealing with the shortest of short-term suspensions. There's a whole body of case law that does apply and doesn't apply.

I think it is clear, and frankly counsel has conceded, that you could not say that they could not have punished that speech. It depends on the context. And I think what we haven't mention so far is the true context. The full context. What was going on in our nation and what was going on in our schools at the time.

THE COURT: Isn't that a little bit dangerous though? Because if you're thinking back to a case like Tinker which is also arose out of what was going on in our nation and what was going on in our country, and so on. If we get too concerned with the impact of Columbine, for example, the school violence, or even little ones in primary grades literally shooting each other.

MR. KELLY: Yes.

THE COURT: Then we're dealing with some of the primal constitutional law which is when the state overreacts is when we have the most problems.

When we get the most justification is when we should be the most vigilant – arguably.

MR. KELLY: Well, that's true.

THE COURT: So in saying I am not going to find malice, which is pretty much – and I don't think that is being raised here. It is saying, okay, we have a legitimate concern here. And in fact it is a heightened concerned because of Columbine. What do I do now with my constitutional hammer and tongs?

MR. KELLY: Well, I think what happens is when you've added that context, you move the focus point, you move that threshold to where you could say that there's absolutely no basis for this punishment. We do. And we are doing it today with 9/11. Okay. What might have been considered outrageous before, okay, is not necessarily outrageous today, nor was it at the time. Not to suggest that there isn't a point where it is outrageous and that's understood.

What we're are dealing here with is children that made threats of guns and violence. In the context of children not much older were killed and other children killed. And three more incidents occurred in this particular school. And of course from my prospective it's helpful because I don't need to be 100 percent right. I don't need to have to convince your Honor or the jury they that would have done it the same way. And that of course is the issue that we are dealing with is the constitutional depravation – that's not the question.

The question is was it so outside of the bounds of reasonableness and of course counsel has conceded that with the substantive due process – that's not here.

THE COURT: Well, I don't want to be hanging Mr. Daily with the substantive due process and say that I pushed him against the wall and that he was polite.

Are you saying that's the only way in which this case can in

fact climb over the wall of the summary judgment standard? And that is to demonstrate such outrageous and insane conduct because of some kind of substantive due process, right? And if so, how are you getting there?

And my second question is if in fact I do agree with you that you have a certain grey area presented here in which you have the authority to fumble around, as it were, provided you don't seek and destroy, as it were, what's the authority for that? And what is the constitutional analysis that you're employing?

MR. KELLY: Very well. It is clear under the Seal decision that in the substantive due process arena we are dealing with a rational relation and we understand that. And the words rare and extraordinary cases are used by the courts to decide when we could intervene and say, you know what, this bears no rational relation to anything. The bar is very high. And in fact those decisions have used words that I think are quite appropriate here. That is, "It is not the role in federal courts to set aside decisions by school administrators, where the court may view them as lacking in wisdom or compassion."

Frankly, I think that may be that's what we have here.

THE COURT: What case are you looking at?

MR. KELLY: That's the Seal, S-E-A-L, decision.

THE COURT: And the issue being raised in Seal is?

MR. KELLY: The issue raised in Seal, of course not fresh in mind, I apologize.

THE COURT: Yes.

MR. KELLY: I have it back in my desk and glad to look at it. But it was in that case an expulsion.

THE COURT: For?

MR. KELLY: If memory serves me. Indeed many of the cases that we are talking about here today are expulsion cases, some of which were upheld and some which are not.

I am getting a little off the point, but I think it is helpful to fall back and look. What we are looking at is a short-term suspension that is less than ten days. And we're looking at frankly one of the shorter versions of that continuum, that is three-day out of the ten day.

So the analysis under Goss is very lax from a procedural due process standpoint. And I would point out converse, there is not a decision that I am aware of nor has one been pointed out by counsel that has ever held that a short term suspension, let alone a three day short-term suspension has violated substantive or procedural due process grounds. In every instance, the courts have said, you know what, that is what our principals do everyday. And unless you are going to point to something that is so outrageous, and they haven't seen it yet that we need to allow our principals to continue along to do the minutiae of discipline every day.

THE COURT: Seal appears to be a case out of Tennessee in which the Sixth Circuit opined various things, including the statement that you made, which I'm going to look at. But the context was that a student was expelled from high school after a friend's knife was found in his car.

MR. KELLY: Right.

THE COURT: And the Sixth Circuit held that suspending or expelling a student for weapons possession pursuant to a zero tolerance policy, even if the student did not knowingly possess any weapon would not be rationally related to any legitimate relationship need so as to survive a due process challenge. That absent of any evidence about what the Board of Education concluded regarding the student's knowledge precluded summary judgment, but that the superintendent was entitled to qualified immunity.

Now, we have not discussed qualified immunity and we are not going to unless and until it is demonstrated that there is a genuine constitutional issue that is involved in the conduct of the

school.

The challenge that is going on in Seal, which of course is not a first amendment challenged and that is really what the basis of the claim is here, as well as due process, is the presence of this hunting knife in the car of the student and the ultimate decision to expel him because of that.

Now, the part of Seal you are talking about related to talking about compassion one way or the other?

MR. KELLY: I apologize, your Honor?

THE COURT: You are quoting out of Seal. What was the –

MR. KELLY: The context of Seal, we are deciding and discussing where the phrase rare and exceptional circumstances is when the court will come in and say, you know what, you have over stepped your bounds. And in the context of Seal what they had an official zero tolerance policy, which I think is important and I would like to address it at some point, because we don't have it here. But that policy as it was written did not require any knowledge on the part of the offender. I think the court properly found that you can't have that, and they said that's unconstitutional. I have no quarrel with that case.

Quite frankly, I think – if I could step back with your permission, your Honor.

THE COURT: Yes.

MR. KELLY: We were talking about policy 525. And I think it important to note that the constitutionality of 525 has never been attacked in this case. All right. The premise of this entire case there was a board zero tolerance policy, and that was the premise when the case instituted.

What has become abundantly clear since then, is the only policies adopted by the board relative to discipline of course were 525 and 529. There is no contrary to case in Seal and similar

cases. There is no board zero tolerance policy here to attack. Love it or hate it, whether it be right or wrong, it's just not there. I think that that's critical because before we get to the heart issues of 1983, there has to be a policy of the governing municipal entity to attack.

THE COURT: Well, wouldn't a clearer way into this be, since there appears to be a some factual dispute, whether or not it is a material another issue. But given the facts that people are disagreeing with each other on certain of the facts, why not look at the issue as one in which there is from the letters sent home, where does that appear in the record?

Mr. Daily, you were saying that the principal had sent home certain statements – the letter.

MR. KELLY: March 10th. It said basically said, you know what, we are not tolerating this; this is serious issue and we plan on protecting our children and everybody should know that we take this very seriously and we'll net out punishment if this happens.

THE COURT: This being what? Where is the letter? Exhibit F. "During this past week," I am quoting now from the first sentence. "During this past week a number of you–" Strike that. Let's start over.

Exhibit F says as follows. "Dear Parents/Guardian, during this past week a number of you have expressed concerns regarding the news article about the young child who made statements in which reference was made to weapons. Because of this I would like to reassure that appropriate steps are being taken so that it is understood that Wilson's School takes an active stance with regard to this kind of behavior. Today I will be speaking with all of the children about the seriousness of making statements in which reference is made to violence or weapons and the consequences that may result."

I am taking that second paragraph that begins the with

words, "Today I'll be speaking with all of the children about the seriousness of making statements in which reference is made to violence or weapons and the consequences that may result."

To encompass this statement, "I have a bazooka and I'm going to kill you," and I view that March 10th letter as expressing a policy that clearly indicates that that will not be acceptable and that everybody is gong to be told that is not acceptable.

Now, as far as I am concerned that's a zero tolerance policy so I am not falling off the bench in horror at it. I am saying that that is a clear expression. And I think Mr. Daily is saying if you want to get excited about that if somebody walks up and says, "I have a bazooka and I'm going to kill you," while I am standing at my locker, I am entitled to tell the principal and the speaker will be punished in accord with this expression by Principal Bauman, about what the school intends to do, and no one is fighting you.

Mr. Daily says that's probably pretty extreme, but if that is what they want to do, it's their school and we are not upset about it.

MR. KELLY: That is right.

THE COURT: So I have no problems talking about zero tolerance for making segments in which reference is made to violence or weapons. This is a very clearly pinpointed focus that Mr. Daily is bringing to the Court with respect to the constitutionality of A.G. When A.G., notwithstanding that policy says, "I have a bazooka I'm going to kill you," because he's playing cops and robbers at the age of six with his friend Kenny, as it were, it is an unconstitutional application of that policy that is being implicated and unreasonably so, and therefore unconstitutionally so.

Is that what you are saying, Mr. Daily?

MR. DAILY: Yes, that's part of what I am saying. I am also saying that when you frame the policy so broadly that it says in reference instead of saying any student who makes a statement

about guns and violence as part of a threat directed towards another student or directed towards staff is going to be subjected to this, I don't have a problem with that. I have the problem when you make it so broad that you that the policy goes over the constitutional line.

Like in the Saxe case where they said any kind of comments about someone's character or something like that, would be penalized. And the case out of the Tenth Circuit, the Sampson case, where they said any comments with violent overtones, when you make it that broad, that's what removes the contextual element from the mix. You make it so broad that contents no longer matters. And that's what happened here with this policy.

THE COURT: All right. Let's go on with the March 10th letter and flesh it out a little bit more as the principal does. After the second paragraph and that sentence, "Today I will be speaking with all of the children," are the third and fourth paragraphs each of which is one sentence long.

third paragraph, "I ask your cooperation in discussing with your children the inappropriateness of this type of behavior." And the behavior has to be making statements in which references made to violence or weapons.

Second sentence. Sorry, there were two in the third paragraph is, "They must understand that immediate disciplinary action will be taken." And then the last sentence is, "Please be assured that the safety of your child is of the utmost importance to us. And we are ever vigilant with regard to inappropriate or unsafe statements and behaviors."

Now the issue with whether or not that expression of intent and policy in the March 10, 2000 letter, is per se unconstitutional because it scoops into its application protected speech because there is no threat involved in the content of the speech.

Are you saying that , Mr. Daily, that I could refer to guns

and violence provided there is no threat posed to the person I am speaking to?

MR. DAILY: Exactly. As I give the statement, if a child says I want to take a gun and kill Ben Laden, he would be scooped up under that policy.

THE COURT: All right. Respond then to what is now a double-barrel challenge. The March 10, 2000 intent and policy of the school expressed is too broad and attackable under the Third Circuit case we have been talking about, that Sampson or –

MR. DAILY: Saxe.

THE COURT: S-A-X-E. And two, if that is not the case, is it still improper for the school to exercise its policy when a child makes this statement in the context of a game?

MR. KELLY: First of all, your Honor, I do not believe that the March 10th letter in any way constitute a zero tolerance policy. As I understand that definition, as I think that your Honor articulated earlier, as I understand it and I recall your Honor articulated, a zero tolerance policy basically means if you to A, whatever A may be, you will get B. I have no discretion. You have no say. That is the way it.

The classic example is the law of New Jersey, that is you bring a weapon to school, it's in the statute, you get expelled. That all there is to it. That's a zero tolerance policy as I understand it and as I understand the allegation of this case. This letter is nothing more nothing less than a lot of parents getting home from principals all of the time, basically saying this is a concern that I know you have currently at our school and we share it with you. And you know what we are not putting up with it and we'll take an active stance for this kind of behavior and we'll take immediate disciplinary action.

THE COURT: What kind of behavior?

MR. KELLY: It's intentionally broad so that we could get

to the point where we are dealing with discretion, which is exactly what happened in this case. That is the final point. That's the ultimate point in this case. This is discretionary action taken by a principal in response to what was reported to her. This letter nowhere indicates that if you say X, you are automatically getting what. Nor that is what ever happened in the school, so it cannot be a zero tolerance policy.

My point is once you get beyond the fact it is into the a zero tolerance issue, that's it's a principal who made a decision. Now, we may think that she was too harsh. Maybe she's a very strict principal. Maybe some people would say, you know what, these kids should have been kicked out. Once we start agreeing that that dialogue could occur, then I would respectfully submit I win this case because that dialogue not allowed to happen, it's supposed to be left to principal.

But in this particular case, it was discretionary act of the principal. Was it consistent with this letter? Absolutely. Did she take immediate steps? No doubt about it. Is three days too long? Maybe not. Maybe I think it should have said four. Maybe it should have been one. But it's not a zero tolerance policy, and not for to us decide, frankly, whether it was too harsh or not too harsh. She took immediate steps within her discretion and within her powers as principal.

And that was my initial argument that if we don't have a zero tolerance policy and we just have a strict principal whose not tolerating threats, that's not a constitutional claim, I don't believe. Unless the facts of this particular case clearly say this wasn't a threat, this was a viewpoint, a free speech, or anything like that. That is not what we have.

THE COURT: Again, and I like the way you are analyzing it. Mr. Daily is saying that we do have something that is protected: We have the protected right of a kid to shout otherwise

inappropriate unsafe statement in the context of the game of cops and robbers.

MR. KELLY: Well, I actually hear Mr. Daily differently. What he is actually saying is, you know what, depending on who is saying to or how, this might not be protected speech. It might not be. Nobody is sitting here and arguing threats to kill somebody is always protected. He is not making that argument.

So now we are at the point where we agree that we have threats being made and in some circumstances there may be protected and some circumstances they are not, depending upon the context. I have a context that was enveloping this whole nation, this particular school to degree this principal wrote a letter home and visited every classroom. I think it is important to put ourselves or try to put ourselves in that school and understand what parents were dealing with, that had kids that went away to school and a principal that was in charge of keeping everyone safe where a couple months before we had two first grader kill each other.

We wouldn't be here if it were 10 years ago, because this doesn't happen in our country. To sit here and say that those threats were protected free speech on that day in that school yard in that context, I respectfully say you can't get there.

THE COURT: And you can't get there because of the authority of the school to regulate threats in the context of school authority to run the school in a way that it believes is vigilant and in keeping with the desires of the parents, correct?

MR. KELLY: Yes, and potential disruption.

THE COURT: Potential disruption being that we actually having kids killing each other in the first grade and we just better bar the door as quickly and thoroughly as we can, is that it?

MR. KELLY: You. You don't even have to get that far because God forbid we measure disruption by people actually getting hurt. These are kindergartners. Okay? They get scared

and terrified by a lot of things that we may think are silly and they will think silly in first grade. But when you see on the news coverage and you hear what's going on day in and day out and then the next day you have somebody threaten to shoot somebody you know in that classroom, because this is all age context appropriate, this is how we've analyzed this, and you have an another student overhearing that and getting upset and going to tell her teacher, are we say to that's a constitutional violation and not punish those kids when I just told you not to do it? And is hard because what we do for a living and sitting here analyzing these cases. But you know what I have a kindergarten, that is neither here nor there.

THE COURT: No, it probably is here or there, because we are talking about real life as well as the age.

MR. KELLY: We're talking about real life, but respectfully the principal is dealing with real life every day. That's why we have dealing two lives all dealing with what I call minutiae, I don't mean to minimize. But the short-term suspensions where every day – in fact, we have dealt it. If you have procedural due process issues with short-term suspension, you're dealing with talking to the principal's office, that's the law.

We actually have a law that says that. You don't need to have conferences, you don't need to go to board, you ask everybody what happened and you decide that you get. Maybe it's three days, maybe it's one day, maybe it's a note home to mom. This young man and his other three friends got three days.

THE COURT: Let me ask you something. One of the practical real life issues that is raised is that this child would have a permanent blot on his record based upon the consequences of that decision. There seems to be a fight between the parties that really could be cleared up here once and for all. You made the representation in the group that all we have are Bauman's notes and that that's really not going to harm the boy, is that correct?

MR. KELLY: It is correct. I would suggest that if you ask Mr. Daily, we are really not in disagreement on that. So you understand the notes, this came out at deposition. And that's the only time they were ever produced when somebody asked for them. She has a legal pad much like this. The record should reflect this is a large legal pad. Where she writes down everything that happens during the day as she walks the hallways of school: Name, whatever, he did this, late, need a note for parent. And yet somewhere in a legal pad was a reference to this and it stayed in her desk draw until the suit was filed.

When you look at the actual record which is not more than an index card at that level, he is not even marked as being suspended; it is not there. That's his record, and there is no agreement disagreement about that, and I don't think Mr. Daily will argue that.

THE COURT: Okay. The issue of how the discipline was meeted-out. Mr. Daily says that nothing could have been decided of consequences unless and until a dialogue with the parents had taken place and that that was a necessary predicate to the school making the decision it made. You are saying it was free to make the decision in the absence.

MR. KELLY: I think the Goss decision is quite clear that their need specifically be – need be no meeting of parents when you are dealing with short-term suspension. Or dealing expulsion and long term, absolutely they did it wrong. But when you are dealing with short-term suspension, they specifically say that informal office meeting where each side tells their side of the story, that is all required and then you could do when you need to do in that zero to ten days.

It's not required that they call the parents in. And could you imagine for every time a kid is running down the hallway, got a drink of water when he supposed to, pushed another kid down,

gee, I have to call the parent from work and before I have to meet-out discipline. The Supreme Court has recognized that's not the law and they did that here. This wasn't complicated. What did you say? What he did say,? You know you're not supposed to do that. Did you do it? Yes, I did. You're going home.

It's also important to understand the principal did call everybody. And in fact mom and dad were at work. Grandmother was home and got grandmother on the phone and told her what happened. So reasonable steps were taken here.

THE COURT: Are you saying in part, Mr. Kelly, that really no matter what, it is a very, very, very high bar to hurdle to argue that a three-day suspension in reaction to a potentially disciplined oriented activity is unconstitutional?

Just follow me again. Because what you are saying is, we don't need to convene the Haig court if we are going to do a three-day discipline. We can do it.

MR. KELLY: Yes.

THE COURT: A three-day suspension is the shortest of the short-term suspension available as a disciplinary measure. The activity involved here, speech and content refers to guns and death, is a subject on which we maybe heard as a school, and therefore, put that all together you have got the lightest – and suspensions are within our tool box of disciplinary measures, put that all together, how could you ever come up with a claim that the action is arbitrary? Is that so horrifying as to shock the conscience? Is that pretty much your claim?

MR. KELLY: That's true.

THE COURT: And you are saying in terms of procedural due process issue, enough was done under the procedure afforded and no further process was due A.G. because this fell within the regulatory measures and how they were applied, correct?

MR. KELLY: That's correct.

THE COURT: Now equal protection. Is there such a lack of context for the decision of the school board to discipline at all as to break any rational relationship or basis for taking the activity on equal protection such ground.

MR. KELLY: I would submit that there clearly isn't. And I would point out in answering the question and cite a litany of cases, your Honor, where administrative bodies and courts like we're here today examined short-term suspensions, and not one of them has ever been found to be defective in any standpoint from procedural or substantive challenges. And I think there's a good reason for that. Because we would be all sitting here second guessing every detention a principal gave in federal court. And I use the phrase don't make a federal case out of it. That's what is frankly what was done in this case. And I am arguing that we should end it here and it shouldn't be a federal case.

THE COURT: Okay. Mr. Daily, one last question to you. Thank you, Mr. Kelly.

MR. KELLY: Thank you, your Honor.

THE COURT: Thank you. Albeit that we begin with speech and expression in the First Amendment kind of comes into the room. Does it go out of the room because of Mr. Kelly's point that what you are really talking about is a decision to impose the discipline, short-term suspension in the context of a statement that references guns and violence, and therefore, we don't have to get into the exquisite nature of First Amendments rights, we go right to the heart of the matter and that is whether or not the school has discretion act as it did because there is no constitutional bar to its acting as it did under the Fourteenth Amendment?

MR. DAILY: Well, you start out with a constitutional bar when the school as a state entity cannot wily nilly impose penalties which involve depriving students of education. The term short-term suspension, again we get back to context, I don't see where a

three-day suspension for a kindergartner is in any regards short-term, you know in terms of significance. It is a very significant act.

In fact, one of the things that I am rather skeptical of is Principal Bauman said that she had the right to impose this suspension under the written policies of the school board. Another potential interpretation of the policies of the school board, which the defendants have not taken and have chosen to stand and fight on that this was a policy that Baumann could take, is that the school board actually never perceived that children in the elementary grades would be suspended. And that they only chose suspension as a penalty for secondary school students. They never perceived that kindergartners would be suspended.

So I suggest that this de minimis argument is what happened to this body is, you know, doesn't have a proper underpinning, that what happened here was very significant. And that being the case, when the government ends to the degree that something being done is significant, then that reflects upon the procedures that the governmental entity has to follow taking into account the whole circumstances.

Now I agree, if these were eighth graders, they could speak for themselves, they could defend themselves. A kindergarten student is when argued, you know you are not supposed that, based upon statements made the previous Friday, he wasn't in a position to speak to respond to that.

When you are going to do something as significant as this to a kindergartners or first graders, and you admit that they don't understand what's going on, then certainly somebody should be there who does understand what's going on to advocate their position.

THE COURT: But, Mr. Kelly is saying that flies in the face of a very practical protection for the schools which is that they can impose short-term suspensions without any intermediate forum to

kind of debate the issue.

MR. DAILY: I am not suggesting there would be an intermediate forum. I am just suggesting that the situation should have been such that the children were in a position or somebody on their behalf was in a position to understand what's going on.

THE COURT: Well, does that go to the compassionate or wise nature of the activity ultimately taken by the school? Or is that one of those grey area, less than perfect decisions that we let them make, because otherwise we serve as a super conscience that can be called upon at every point along the way?

MR. DAILY: I don't think the severity, I am not asking this Court to review the appropriateness of the penalty. What I am saying is that the penalty that was eventually levied indicates the degree of significance of the proceeding, and when the proceeding is of high significance, then correspondingly the due process protections should be elevated. I am not asking for them to be elevated much. I am not asking for a formal hearing. I am not asking for witnesses and cross examination.

THE COURT: Yes –

MR. DAILY: All I am asking somebody who understood what was going on, maybe the parent could be there.

THE COURT: So you are saying in any suspension measure of a kindergartner or child of tender years, there can be no decision made to impose that discipline without involving the parents simply because of an absent of the ability to determine, or in the this case the admission that the kid just doesn't understand this, so how could you punish him this way by suspending him?

MR. DAILY: In part I am suggesting that. I am not suggesting a brightline rule in every time it a kindergartner or every time it's a first grader that you've got to have the parent there. What I am suggesting that in a situation where the school knows that the children were playing cops and robbers and that there's a

good chance that they stumbled across, unintentionally, violating this alleged, this policy, that in that situation that they have a fair proceeding, you need the student, the child needed somebody there who could to some degree advocate their position.

Now, if in fact that occurred and this still imposed the same penalty, well, then, yeah, I am dead in the water because I am arguing to this Court that compassion, you know, that the Court should substitute its judgment as to appropriateness as to the penalty of that of the school board. I am not arguing that. I am saying – the Supreme Court said procedural due process does not lend itself to brightline rules. You take a reasonable view of a situation and you fix it according to that.

I can't help but thinking that if the parent had come in and said he did this and we told these children; well, my child wasn't there; I didn't get your letter. I can't believe that Principal Bauman could be such an ogre that she wouldn't have taken that into account.

THE COURT: Okay. I appreciate that. Counsel give me about ten minutes and I'll pull together my notes and I'll give you a decision. All right?

MR. DAILY: Your Honor, if I may. In regards to the context issue. I think I believe that it's not appropriate that to do a parsing of the actual – to parse the words from the contents, and then say, okay, the words flunk, so there wasn't a constitutional violation, I think they have to be considered together. Because the meaning of words set forth, that are spoken depends to a large degree on the context in which they are stating.

Quite frequently in employment cases, in Koenig analysis, there's the problem, was the employee setting a matter of public concern, or was he setting forth a personal dispute between him and his supervisor. If it is a personal dispute, there is no protection. So the meaning of these words as to whether or not they were a

threat or whether they were some manifestation of violence, all comes down to where they were set forth. And my view is it is no more than if supposed Principal Bauman was walking passed a classroom and students were asked if they could go home and come back and perform a play, and couple students did part of the Macbeth and heard some of the word from Macbeth coming out the door, and ran in and say, OH, I heard the person playing Banco say they have going to slew Macbeth. That is a threat.

The proper text, I heard Banco say they were going to slay Macbeth, but my Elizabethan English is faltering here.

But, again, your Honor, doing this parsing of these are the words and, you know, we are going to let the governmental entities, the school officials off the hook, because, you know, because we are not going to consider the context, that's enough that gets the school officials off the hook. I might agree with that if there were no state of facts present in this case from which a-fair-minded jury could conclude that the school officials did not know or were in some sort of doubt as to the exact nature of the context.

But I assert that a-fair-minded jury in this case could determine that Principal Bauman did in fact no exactly both the words and the context, knew exactly the meaning of what was going on and she admitted, she stated to Superintendent Bauer that she was aware of that. And furthermore, the reentry meeting, she didn't say, according to our version of the facts, she didn't say, look, I agree with you, it's a close call, but the word were spoken, therefore I think they fall close enough to my regulations that as principal, I'm exercising my discuss discretion and I am making the decision this way.

She said, I have to do it because of the policy. I have to do it, doesn't matter what the context was. So, in my estimation if she had said to the people –

THE COURT: Let me just ask you one question there.

Let's look at her making that statement to justify. Is she not clothed in making that justification with qualified immunity that in acting as she did and justifying in her own mind and later on explaining to others why she acted the way she did and choosing that justification, is she not clothed from the qualified immunity because she at that time was not violating a clearly known constitutional right of A.G.'s?

MR. DAILY: I'm going now to the argument I made in regards to the qualified immunity analysis.

THE COURT: Yes.

MR. DAILY: As I look at that issue, the issue is as a public official, did she, could she reasonably take the position that as – as long as I'm following a policy, I can do what I want to do it here?

THE COURT: No. I think we have got to be a little less doctrineered than that. Is she entitled to apply what she believes is the approved policy in this contexts and arguably after we in our suits take it apart, x-ray it, apply all kind of cases and principles to it, and decide she shouldn't have?

Now we go back to her and we say, is what she did a violation of the clearly known constitutional right so as to deprive her of her qualified immunity insofar as she was a state employee doing her job?

MR. DAILY: Under that scenario, particularly in light of the Supreme Court's pronouncements in Saucier.

THE COURT: Yes.

MR. DAILY: I would say she would probably get the –

THE COURT: S A U C I E R.

Off the record.

(Discussion off the record).

THE COURT: Back on the record. I think that that's a fair statement of what Saucier does drive us to. And that doesn't lose the whole thing because then you could make your argument.

However the policy itself is horrific and we go from there.

First of all, I very much appreciate counsel on their feet delving into these issues, not in a parrot-like dependence upon the briefs, but a really good solid discussion of Constitutional Law. It always helps the court to survive these arguments because I wind up going a little bit more.

Let me refer to the notes that I have made. As I said give me ten minutes, and I'll give you the decision.

MR. DAILY: Your Honor, not to beat a horse. I would remind your Honor of the comments that you made in terms of vigilance when the constitution when we have times of stress and publicity and people wanting to chip away at the constitution at those points in time. And, you know, the fact that the Sayreville educators heard of a first grader in Michigan who was very disturbed shooting somebody, I don't think that wherein Sayreville there is no context of that, children showing up with weapons or anything else or violence or strife, I don't think that gives them cart blanche to ratchet up the rules. Because I think that what happened here is the first rule was no guns or threats whatsoever. And unwise rule. Because children are always walking up to each other saying I'm going to kill you or doing something like that. That failed.

You had two kids that did it and then they got some bad press. So the response ratchet up the policy some more. Now, we're making, you just – just the speech words of guns and violence, and that were they went over the lines policy that's when they also, the other barrel, after they knew the exact context of what my client did, they nonetheless plowed ahead with the discipline saying, hey, policy is policy, and we are going to plow ahead with it.

THE COURT: Okay. Thank you.

MR. DAILY: The other thing is, to talk about cases, absent

of cases on short-term suspensions in the context of kindergartners, the reason for that is because there were no first graders ever get suspended. Thank you.

THE COURT: Thank you.

RECESS TAKEN).

THE COURT: Back on the record.

I have to make the preliminary observation that judges and lawyers such as yourselves are frequently asked to sit as judges in mock moot court arguments, and the common old saw and cliche that's handed out to the students is, gee, you are better than most of the lawyers that I see in my courtroom, aren't you great. And very often that's true. I am sure you have had that experience in your own lives.

Here, I can honestly say that the lawyers are better than the students in moot court arguments, which is really high praise indeed.

The matter that we have before the court is constitutional challenge and in order to respond the Court has the decide where to focus, and in doing so is of course guided by the claims raised in the complaint and the arguments made on summary judgment by the defendants, all of which usually point to the position there was no constitutional violation, but if there was, we had qualified immunity to do what we did.

We have made an effort to decide what constitutional tools to use, what framework to examine the perceived constitutional wrong. And in analyzing the case and making a decision, the Court will of necessity either impliedly or explicitly have a hierarchy of which constitutional claims appear to fit particular facts of a case the best and then try to draw some conclusions from that. And in every case, and this one is one of all cases, the fit is a little inexact once the hierarchy what tests appear to be the most useful is established.

It would appear and did appear for awhile in my eyes that the First Amendment claim was the appropriate one to really

concentrate on because we are dealing with speech. We are dealing with context of speech, a game. We are dealing with the activity of a student in school and the effort of the school to regulate speech and the reaction of the school to the conduct of little A.G. and did you say, "I have a bazooka and I'm going to kill you?" And A.G. said, "Yes." And we went from there.

I think that to analyze this case from that prospective and to draw legal conclusions from an analysis that begins with the right of A.G. as a student playing cops and robbers to say what he said is a too narrow and ultimately unsatisfied way to analyzed the case for two reasons. First, there is some factual dispute that might or might not be germane to that particular analysis. And that is how much disruption actually occurred after the remarks were made.

We do know, and it is undisputed, that the principal learned about from the report of another student. And its plaintiff's possession that that student was an out and out tattletale and that any of the other reactions would be excluded from the jury because of hearsay, and therefore I can't go any further than that I think begs the question. The facts I think clearly demonstrate that there was some reaction to what was said, otherwise the principal wouldn't have learned about it. How much reaction there was, whether it constituted a disruption becomes an issue if we just simply clamp down on this as a First Amendment issue.

I think it has to be broadened to an issue that exams the conduct of the school in assessing the statements of A.G. in the context of the school's announced intention to take seriously speech that seriously speech that refers to guns and violence. That intention having been expressed in the letter, Exhibit F, of the principal to all parents and guardians. And I have quoted from that letter.

Mr. Daily as a good constitutional lawyer and advocate says that letter in of itself is unconstitutional and refers to the Saxe, S-A-X-E, case. But I think, again, to have gotten involved in

whether or not the letter was policy with a capital P or overly broad and, so on, misses the point.

The letter explains to me as the Court sitting here trying to exercise my summary judgment function, why Baumann acted as Baumann did upon the report that A.G. had uttered these statements in the school yard, and upon the confirmation by A.G. that indeed he had.

So my focus then goes to Baumann's next activity, which was to evaluate what she should or should not do about it. And in that context, she made the decision to send A.G. home with a letter explaining that he would be suspended because he did what he did. We don't have any dispute that he did what he did. It's the import of what he said, it's the reaction to what he said that concerns the parents.

Now, in responding to that particular view of events, the response and the reaction of the school to A.G.'s admissions, the rights of A.G. and the regulatory authority of the school becomes something that we look at in the context of the due process analysis that's set forth in the cases. And Mr. Daily is absolutely right that in the Supreme Court case of in this case Palmer versus Merluzzi but citing to Matthews versus Eldridge 424 U.S. 319, 1996, the court indicated "Due process is a flexible concept and the process due in any situation is to be determined by way of the private interests at stake, the governmental interests at stake, and the fairness and reliability of the existing procedures and probable value, if any, of additional procedural safeguards."

I am really zeroing in, as Mr. Daily probably doesn't want me to because he was talking about context with reference to what was said and done by A.G. I am zeroing in to governmental interests at stake and the context in which the school acted in part looking at what was going on then, and very cognizant of what Mr. Daily reminded me at the end of his argument, which is in the

heightened concerns of schools to the problem of guns and violence on school premises occasioned by Columbine and the actions of the clearly disturbed young man, were there constitutional infirmities in how Baumann and the school board took action?

I think that recognizing those concerns is important, not to justify and excuse, but to give some realty to the events here. And I find that when Baumann sent home that letter appearing in Exhibit F of March 10, 2000, saying to parents and guardians, "During this past week a number of you have expressed concerns regarding the news article about the young child who made statements in which reference was made to weapons," and went onto reassure parents that appropriate steps are being taken so that it understood that Wilson School takes an active stance with regard to this kind of behavior. Bauann was properly and reasonably reacting or expressing school intentions in a real life context. And in so doing, she set the contents as it were up, albeit under knowingly, but it was foreseeable, for how she would react as the principal to an event that triggered what she was talking about in that letter, which was the seriousness of statements with reference to guns and violence, and unsafe statements.

Let me make sure that my reference to the content of that letter is accurate. She talks about the seriousness of making statements in which reference is made to violence or weapons. And she talks about the school being "ever vigilant with regard to inappropriate or unsafe statements and behaviors."

Now we can get very judgmental about Baumann's interpretation of what is an inappropriate or unsafe statement and behavior. And we can in fact have healthy debates, which we have done today, about whether or not making the statement that A.G. made in the context of cops and robbers is unsafe or inappropriate.

But I am looking taking a step backward, I am looking at what Baumann had in front of her when she evaluated as she did in

her appropriate response in light of her appropriate expressed intentions about a situation that was very real and very much in the minds of the parents and school authorities. And I find that her response was reasonable and within in her authority and did not implicate any fundamental constitutional rights that A.G. could assert in that context.

It did not thread upon an absolutely fundamental right never to be suspended or to go to school every day of the school year notwithstanding any other concerns, it did not violate the process due when in making her evaluation and in choosing a suspension she triggered the least harsh of the suspension terms available the her. And it did not impermissibly punish and/or regulate content or speech, content of which was per se beyond the reach of the school authorities indeed can't be denied that the reference to guns and violence, depending upon how it was made, was something that the school could react to and had announced it was going to react t and the plaintiff is not an arguing about that.

What the plaintiffs saying is that in exercising her authority, what Bowman was doing was a blind robotic application of a blind robotic zero tolerance policy relating to words. And I don't find that the letter of March 10th, or the actual written policy of the school board relates to that kind of a situation. So to the extent that there are statements in the record about policy is policy and zero tolerance, I don't find they are really reaching the actual constitutionally based factual scenario, which is the authority of the principal to discipline the context in which she disciplined and the context in which A.G.'s behavior was analyzed, which I think is pinpointing in the March 10, 2000 letter.

So if I had to say whether in a word whether in a word in quotes "What I am doing here? " I am making a due process analysis. I am make of the two of them a procedural due process analysis and finding that the process that should be afforded A.G.

was afforded him. And that the response of the school was appropriate given the government interests at stake, even those interests is that were perhaps more heighten then than now because we have other concerns to worry about. Mr. Kelly referenced 9/11. Or had not been as heightened before. Because I don't find that I am letting the constitutional gate down by doing that. I am looking at what was really going on in time and finding that the school properly exercised its authority.

If I look at the shock to conscience test that somehow gets wield in here, and saying what was done was so impermissibly excessive, I am still really within the due process context. Was the punishment too too harsh? I think that Mr. Daily makes a very practical point. Had the parents been spoken to before that choice was made that day by the principal, they could have pointed out that their boy wasn't in school the day that she visited his classroom and that he never brought the letter home that she sent, so they do have "home schooled him" in quotes, little home and little school or spoken to him personally about not making those statements.

But she didn't have the ability to do that today and we are getting into whether or not she could constitutionally make a decision that she made, and I find she could because she's allowed to under the way suspension discipline works.

Now, would she do it all over again? No, she doesn't want this lawsuit. Has she learned her lesson? Possibly. Has the school board had meeting after meeting about this including the extent of Mr. Kelly's bills and how we don't want to pay these bills any more, so let's make sure we don't have to do this. I am only kidding. Sure.

But then, if in fact I am wrong on all of this and congressional deprivation could somehow be found in the middle of all of this and we know that's so because we wouldn't do it again, because we will use that kind of sequitur reasoning, the fact of the

matter is there's still that big broad umbrella of qualified immunity that's granted to Baumann under the circumstances. And so my fall back in my analysis is even where we to say that there was a clearly no constitutional right on the part of A.G. as a little kid playing cops and robbers to bellow out what he did, and that Baumann should have acted so as to protect that, it was not under the Saucier versus Katz decision of the U.S. Supreme Court last year, there was not under that case the kind of clearly no constitutional right available to Baumann then so as to find that her activities were unconstitutional.

Nor do I find in this record the policy that was so constitutionally informed as to deprive her as somebody implementing that policy of the protection of qualified immunity. And therefore on those grounds articulated in this decision, I am granting summary judgment in factor of the defendant, and we'll enter an order to that effect.

Thank you very much everybody.

MR DAILY: Thank you.

MR. KELLY: Thank you.

D1

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

S.G. as Guardian ad Litem of A.G. as minor and individually,

Plaintiff,

vs.

Sayreville Board of Education, Georgia B. Baumann and William Bauer,

Defendants.

Case No. 2:00cv02727

COMPLAINT

Plaintiffs, S.G. and A.G., by way of complaint against the defendants say:

Parties, Jurisdiction and Venue

1. Plaintiff, S.G., is an individual, a resident of Sayreville, New Jersey and the father of plaintiff, A.G., age 6.

2. Defendant, Sayreville Board of Education, is a public entity created under the laws of the State of New Jersey and maintains a principal place of business at P.O. Box 997, Sayreville, Middlesex County, New Jersey.

3. Defendant, Georgia B. Baumann, is an individual, who at all times relevant to this matter was employed by defendant,

Sayreville Board of Education, as Principal of Wilson Elementary School. She is sued in this matter in both her official capacity as Principal of Wilson Elementary School and as an individual.

4. Defendant, William L. Bauer, is an individual, who at all times relevant to this matter was employed by defendant, Sayreville Board of Education, as Superintendent of Schools. He is sued in this matter in both his official capacity as Superintendent of Schools and as an individual.

5. In this action the plaintiffs assert that they were deprived of rights, privileges, and immunities secured by the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States.

6. Plaintiffs further assert that they are entitled to seek redress for this deprivation of their rights pursuant to 42 U.S.C.A. §1983 and therefore this court has original jurisdiction over this matter pursuant to 28 U.S.C.A. §1331.

7. Pursuant to 28 U.S.C.A. §1391 venue in this matter is proper in this district in that it is believed this is the district in which all defendants reside and in which in fact the actions complained of occurred.

Factual Allegations

8. At all times relevant to this matter A.G. was a student at Wilson Elementary School.

9. The aforesaid institution was a public school operated, staffed and maintained by defendant, Sayreville Board of Education which at all times relevant herein had the authority to set official policy, practice or custom in connection with the operation

of said school.

10. The named individual defendants at all times relevant herein were high level officials and policy makes who were vested by defendant, Sayreville Board of Education, with authority to establish official policy with respect to matters concerning the day to day operation of the aforesaid school and to make final decisions in regard to the implementation and execution of such official policies.

11. On or about March 15, 2000 the plaintiff A.G. was playing with two other students during recess.

12. At that time the students engaged in a make believe game of "cops and robbers."

13. While playing the aforesaid make believe game the plaintiff uttered to one of the other participants the words, "I have a bazooka and I'm going to shoot you."

14. The aforesaid remark was reported to the school authorities by other students, who were mere bystanders.

15. Based upon this report the plaintiff and the other participants were removed from their class and placed in the school office where they were questioned regarding their conduct.

16. Thereafter, without notice to the minor plaintiff's parents, defendant, Baumann, suspended the minor plaintiff for three days.

17. Subsequently defendants, Bauer and Sayreville board of Education, affirmed the aforesaid suspension without providing the minor plaintiff or his parents an opportunity to contest

it.

18. As a result of the foregoing the minor plaintiff lost three days from school and entries were made on his pupil record documenting that he had committed an infraction warranting suspension.

19. Prior to the aforesaid occurrences the minor plaintiff had never engaged in any misconduct that required discipline nor had the minor plaintiff been disciplined.

20. The foregoing acts of the defendants were performed intentionally and with malice or reckless indifference to the constitutional and legal rights of the plaintiffs.

21. The foregoing acts of the defendants were unreasonable and without basis.

22. As a result of the aforesaid acts the plaintiffs have sustained a deprivation of rights, privileges, and immunities secured by the Constitution and laws of the United States.

23. As a result of the aforesaid acts the plaintiffs have sustained nonpecuniary losses including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and such other nonpecuniary losses as may be disclosed in discovery.

24. In addition plaintiff in the future may incur pecuniary losses for care, counseling, treatment, and other expenses and plaintiffs reserve the right to assert same in this action.

First Count

25. The aforesaid acts of the defendants were taken

solely as a result of the minor plaintiff's speech and not as a result of any conduct on his part.

26. The words spoken by the plaintiff did not constitute a clear or present danger.

27. The words spoken by the plaintiff occurred during recess and not while plaintiff was engaged in formal study, instruction or activities.

28. As a result the defendants had no basis to suppress and punish the plaintiff for his speech and the actions of the defendants therefore violated the minor plaintiff's clearly established right to free speech as guaranteed by the First Amendment.

29. As a direct result of said unlawful acts the plaintiffs sustained the previously described damages.

30. Pursuant to 42 U.S.C. §1988 plaintiffs are entitled to attorney's fees and expert fees in connection with the bringing of the claims alleged in this count.

WHEREFORE, plaintiffs demand judgment against the defendants for compensatory damages, punitive damages, injunctive relief as will redress the actions of the defendants, attorney's fees, expert fees, prejudgment interest, interest, costs and such other relief as the court deems just.

Second Count

31. Under New Jersey law the minor plaintiff was entitled to a free and thorough public education.

32. The aforesaid actions of the defendants deprived

the plaintiffs of said clearly established rights without due process in violation of the Fifth and Fourteenth Amendments.

33. As a direct result of said unlawful acts the plaintiff sustained the previously described damages.

34. Pursuant to 42 U.S.C. §1988 plaintiffs are entitled to attorney's fees and expert fees in connection with the bringing of the claims alleged in this count.

WHEREFORE, plaintiffs demand judgment against the defendants for compensatory damages, punitive damages, injunctive relief as will redress the actions of the defendants, attorney's fees, expert fees, prejudgment interest, interest, costs and such other relief as the court deems just.

Third Count

35. The actions of the defendants were arbitrary, capricious and without rational basis and deprived the plaintiffs of their substantive due process rights to have the minor plaintiff receive a public education.

36. As a direct result of said unlawful acts the plaintiff sustained the previously described damages.

37. Pursuant to 42 U.S.C. §1988 plaintiffs are entitled to attorney's fees and expert fees in connection with the bringing of the claims alleged in this count.

WHEREFORE, plaintiffs demand judgment against the defendants for compensatory damages, punitive damages, injunctive relief as will redress the actions of the defendants, attorney's fees, expert fees, prejudgment interest, interest, costs and such other

relief as the court deems just.

Fourth Count

38. The actions of defendants and their policy regarding remarks such as made by the minor plaintiffs deprived the plaintiffs of their clearly established right to equal protection under the law in that such actions and policy had no rational basis or relationship to a legitimate governmental interest.

39. As a direct result of said unlawful acts the plaintiff sustained the previously described damages.

40. Pursuant to 42 U.S.C. §1988 plaintiffs are entitled to attorney's fees and expert fees in connection with the bringing of the claims alleged in this count.

WHEREFORE, plaintiffs demand judgment against the defendants for compensatory damages, punitive damages, injunctive relief as will redress the actions of the defendants, attorney's fees, expert fees, prejudgment interest, interest, costs and such other relief as the court deems just.

Fifth Count

41. The actions of the defendants in suspending minor plaintiff for such a trivial matter constituted cruel and unusual punishment in violation of the Eighth Amendment and deprived the minor plaintiff of his clearly established right to be protected from such punishment.

42. As a direct result of said unlawful acts the plaintiff sustained the previously described damages.

43. Pursuant to 42 U.S.C. §1988 plaintiffs are entitled to attorney's fees and expert fees in connection with the bringing of the claims alleged in this count.

WHEREFORE, plaintiffs demand judgment against this defendants for compensatory damages, punitive damages, injunctive relief as will redress the actions of the defendants, attorney's fees, expert fees, prejudgment interest, interest, costs and such other relief as the court deems just.

JURY DEMAND

Plaintiff herewith demands a jury trial as to all issues.

QUINLAN, DUNNE & DAILY, P.A.

BY: F. MICHAEL DAILY, JR.
Attorney for Plaintiff

Dated: May 31, 2000.

UNITED STATES DISTRICT COURT
NEWARK VICINAGE

S.G. as Guardian ad litem for A.G., a minor and individually,

Plaintiff

vs.

Sayreville Board of Education, Georgia B. Baumann and William Bauer

Defendants.

CIVIL CASE NO. 2:00CV02727

ANSWER TO PLAINTIFF'S COMPLAINT WITH AFFIRMATIVE DEFENSES, DESIGNATION OF TRIAL COUNSEL

Defendant, Sayreville Board of Education, Georgia B. Baumann and William Bauer, by way of Answer to plaintiff's Complaint responds as follows:

FIRST COUNT

1. Admitted.

2. Admitted.

3. Only defendant's name and occupation are admitted.

4. Only defendant's name is admitted. Defendant is no longer the Superintendent.

5. All of plaintiff's allegations are denied.

6. All of plaintiff's allegations are denied.

7. All of plaintiff's allegations are denied.

8. Admitted.

9. It is admitted only that Wilson is a public school.

10. Denied.

11. After reasonable investigation, Answering Defendant lacks sufficient knowledge or information to form a belief as to the truth of the averments contained in this paragraph and, therefore, denies same and demands strict proof thereof at Trial.

12. After reasonable investigation, Answering Defendant lacks sufficient knowledge or information to form a belief as to the truth of the averments contained in this paragraph and, therefore, denies same and demands strict proof thereof at Trial.

13. After reasonable investigation, Answering Defendant lacks sufficient knowledge or information to form a belief as to the truth of the averments contained in this paragraph and,

therefore, denies same and demands strict proof thereof at Trial.

14. After reasonable investigation, Answering Defendant lacks sufficient knowledge or information to form a belief as to the truth of the averments contained in this paragraph and, therefore, denies same and demands strict proof thereof at Trial.

15. It is admitted that the Plaintiff was interviewed.

16. It is admitted that Plaintiff was suspended.

17. Denied.

18. Admitted.

19. After reasonable investigation, Answering Defendant lacks sufficient knowledge or information to form a belief as to the truth of the averments contained in this paragraph and, therefore, denies same and demands strict proof thereof at Trial.

20. Denied.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. The allegations in this paragraph are vague and incapable of response. Hence, same are denied.

26. The allegations in this paragraph are vague and incapable of response. Hence, same are denied.

27. Denied. The allegations in this paragraph are vague and incapable of response. Hence, same are denied.

28. Denied.

29. Denied.

30. Denied.

Wherefore, Defendant(s), Sayreville Board of Education, Georgia B. Baumann and William Bauer, demands judgment in its favor and against all other parties.

SECOND COUNT

1. Averments contained in this paragraph state conclusions of law to which no answer is required.

2. Denied.

3. Denied.

4. Denied.

Wherefore, Defendant(s), Sayreville Board of Education, Georgia B. Baumann and William Bauer, demands judgment in its

favor and against all other parties.

THIRD COUNT

1 Denied.

2. Denied.

3. Denied.

Wherefore, Defendant(s), Sayreville Board of Education, Georgia B. Baumann and William Bauer, demands judgment in its favor and against all other parties.

FOURTH COUNT

1. Denied.

2. Denied.

3. Denied.

Wherefore, Defendant(s), Sayreville Board of Education, Georgia B. Baumann and William Bauer, demands judgment in its favor and against all other parties.

FIFTH COUNT

1. Denied.

2. Denied.

3. Denied.

Wherefore, Defendant(s), Sayreville Board of Education, Georgia B. Baumann and William Bauer, demands judgment in its favor and against all other parties.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by their failure to exhaust the appropriate administrative or state remedies at all times hereto.

SECOND AFFIRMATIVE DEFENSE

The defense acted in a reasonable and proper manner.

THIRD AFFIRMATIVE DEFENSE

At all times prevalent hereto, defendants complied with all federal, state and local statutes, regulations and/or ordinances in effect.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to state the cause of action for punitive damages or attorney's fees.

FIFTH AFFIRMATIVE DEFENSE

Defendants are entitled to qualify and/or absolute immunity.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred and/or limited pursuant to the provisions of 42 USCA, Section 1983, and/or NJSA 59:1, et seq.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable Statute of Limitations and/or Laches.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred and/or limited by the provisions of R:2:2-3A and 2:4-1, et seq.; N.J.S.A. 18A:24-18A:27, et seq.; N.J.A.C. 6:3, et seq. -6:24, et seq, and N.J.S.A. §10:5-1, et seq.

DESIGNATION OF TRIAL COUNSEL

PLEASE TAKE NOTICE that pursuant to Rule 4:25-4, Sean X. Kelly, Esquire is hereby designated trial counsel.

MARKS, O'NEILL, O'BRIEN & COURTNEY, P.C.

BY: SEAN X. KELLY, ESQ.
Attorney for Defendant
Sayreville Board of Education, Georgia B. Baumann and William Bauer

Policy No. 525
Pupils

STUDENT DISCIPLINE AND STUDENT CONDUCT

The Board of Education acknowledges that conduct is closely related to learning and that an effective instructional program requires an orderly school environment. The Board believes that the best discipline is self imposed and that students should learn to assume responsibility for their own behavior and the consequences of their actions.

The Board requires each student of this district to adhere to the rules and regulations promulgated by the administration and to submit to such disciplinary measures as are appropriately assigned for infractions of those rules. Such rules shall require that students conform to reasonable standards of socially acceptable behavior, respect the person and property of others, preserve the degree of order necessary to the educational program in which they are engaged, respect the rights of others, and obey constituted authority and respond to those who hold authority.

The Board expects all pupils in this school district, commensurate with their age and ability, to:

1. Prepare themselves mentally and physically for the process of learning;

2. Respect the person, property, and intellectual and creative products of others;

3. Take responsibility for their own behavior and learning;

4. Use time and other resources responsibly;

5. Share responsibilities when working with others;

6. Meet the requirements of each course of study;

7. Monitor their own progress toward school objectives; and

8. Communicate with parents and appropriate school staff members about school matters.

The Board of Education believes that the pupils of this district are entitled to an education free from undue disruption. Pupils who willfully disrupt the educational program shall be subject to the discipline procedures of the district. Every reasonable effort shall be made to determine and remediate the cause or causes of a chronically disruptive pupil's unacceptable conduct.

Disruptive pupils in the secondary grades will be disciplined in accordance with Board policy on suspension and expulsion.

Disruptive pupils in the elementary grades will be reported to the building principal, who may discipline the pupil in accordance with this policy. A pupil who continually and willfully disobeys persons in authority and violates school rules shall be provided with counseling services to explore the cause of his or her unacceptable conduct, assess his or her educational needs, and, if appropriate, plan an instructional program to meet those needs.

The Superintendent shall report regularly to the Board the incidence of acts of violence and vandalism in the school district and shall prepare a remedial plan whenever the report shows a

significant increase in the number of such acts.

Reference: N.J.S.A. 18A:11-1; 18A:17-46 et seq.;
18A:37-1 et seq.
N.J.A.C. 6:8-6.2(b)3

Date Adopted: 9/5/78
Date Revised: 1/15/85, 6/21/94

Policy No. 529
Pupils

SUSPENSION AND EXPULSION

The Board recognizes that exclusion from the educational program of the schools, whether by suspension or expulsion, is the most severe sanction that can be imposed on a student in this district and one that cannot be imposed without due process since exclusion deprives a child of the right of an education.

For purposes of this policy, "suspension" shall be the temporary exclusion by the school principal of a student from a regular school program, and such suspension may take place within as well as outside the school facilities. A "short term suspension" shall be a suspension of not more than ten school days. "Expulsion" shall be the permanent exclusion of a student from the schools of this district. No student below the age of 16 should be expelled from school without provision for an alternate educational program.

No student otherwise eligible for attendance at the schools of this district shall be excluded from school unless that student has

materially and substantially interfered with the maintenance of good order in the schools or unless it is necessary to protect the student's physical or emotional safety and well-being.

A student may be suspended by the building principal, who shall report such action to the Superintendent as soon as possible, and the Superintendent shall report the action to the Board at its next regular meeting. The suspended student may be reinstated by the principal within five days of the suspension or by the Superintendent at any time before the second meeting of the Board following such suspension, or the Board at the first such meeting. At its second regular meeting after the suspension and thereafter, the Board alone may reinstate, continue the suspension or expel the student.

No student shall be deprived of the right to an education in the public schools of this district without notice of the charges and an opportunity to be heard in his/her own behalf before the person or body with the authority to reinstate him/her. Each student shall be afforded an informal hearing before suspension or if circumstances prohibit, as soon as possible after the suspension except that, when extraordinary circumstances involving the health and safety of the student or others in the school require immediate exclusion, the hearing may be delayed to such a time as circumstances permit.

Students suspended for a period of time longer than a short-term suspension shall be afforded a formal hearing which shall take place not later than 21 days after the suspension occurs. A student suspended during examinations or near the end of the school year or at any other period of time critical to his/her educational future may request and receive an immediate hearing, even though the suspension is for a short term.

The name of the student under 18 years of age whose conduct has been disciplined shall not become part of the agenda or minutes of a public meeting nor part of any public record of the Board, but such students shall be designated by code.

(Ref. II-Pupils, Page 21)

Reference: 18A:37-1 et seq

Date Adopted: 9/5/78
Date Revised:

SUSPENSION AND EXPULSION

The following rules are promulgated in accordance with the policy of the Board of Education to provide a fair hearing for each student charged with a suspendable offense.

A. Preliminary Hearing

No student may be suspended without a hearing unless a clear and present danger exists, or it is otherwise impossible or unreasonably difficult to hold such hearing. In such instances, the necessary notice and hearing shall follow as soon as practicable.

The principal or designee shall provide the student with oral and written notice of the charge(s) against him/her and shall provide a hearing for the student before a suspension is ordered, so that the student has a full opportunity to state why s/he should not be suspended. This preliminary hearing shall be an informal one in which the student is given a chance to respond to the charges. The

student's parents may be informed of the charges and the preliminary hearing if the principal so chooses. The hearing will be held on the day of the alleged infraction or as soon thereafter as possible if an emergency prohibits an immediate hearing.

B Short-Term Suspension

The principal may impose a suspension of up to ten days duration, but shall notify the student's parents or guardians of the suspension by telephone and by regular mail and shall send a copy of the notification home with the student.

1. Sending Student Home – Unless the student is an immediate threat to the safety of the school, s/he should remain on in-school suspension until class is dismissed for the day. If the situation indicates that the student should be removed from the premise, the principal shall attempt to reach the student's parents or guardians to request that they come to the school for their child. If they are unable to come to the school, the school shall provide the student transportation home after determining that a responsible adult will be there to receive the student. The principal may forego the previous provision in the event of mass violations of school rules or where it is not possible to keep student(s) on grounds and restore order or protect people on school property. Even in such an emergency situation the principal shall take into account such factors as the distance to home and the age of the individual students involved and shall take whatever action is necessary and possible.

2. Responsibility for School Work – During the period of short-term suspension, the student is responsible for completing classroom assignments, but shall not be refused the opportunity

to take or make up a test nor be given a failing mark of any kind specifically as a result of non-attendance at a meeting of his/her class.

3. Student's Records – A record of the student's offense may be kept until the end of the school year but may not be made part of the permanent record. The days absent shall be noted in the student's permanent attendance record.

C. Prolonged Suspension

If, in the principal's opinion, the alleged infraction warrants a penalty of more than ten days suspension, s/he shall refer the case to the Superintendent within one day. If the Superintendent agrees to extend suspension the principal shall take the following steps.

1. Notice of Hearing – Within three days of the date of suspension, a notice shall be sent by certified mail, addressee only, return receipt requested to the student's parents. The notice shall contain the following:

a. the rule(s) alleged to have been violated;

b. the charges against the student;

c. a summary of the evidence against the student;

d. the names of the accusers;

e. the penalty which the principal proposes to recommend;

f. a full description of the proposed alternative educational program pending the hearing (applicable if the student cannot be readmitted to school pending the hearing);

g. the time and place for the hearing (must be within 21 days of the original suspension);

h. a statement of the student's and parents' entitlement to the following prehearing rights;

i) right to review written statements about the alleged misconduct;

ii) right to review the student's records;

iii) right to request a delay in the hearing of up to five school days;

i. a statement of the student's entitlement to the following hearing rights:

i) right to counsel;

ii) right to translator;

iii) right to appear in own behalf and for parents or guardian to appear;

iv) right to produce witnesses and present evidence on his/her behalf;

v) right to confront and to cross-examine anyone who may have evidence against him/her;

vi) right to a transcript of the hearing.

2. Hearing Panel – A hearing panel shall be convened by order of the Board of Education. The panel may consist of three to five people and may be composed of Board members, teachers, special service personnel or student representatives, as determined by the Board. It shall be chaired by the convener. The hearing panel shall adopt a set of written procedures and shall provide a copy to the student.

3. Decision of Panel – The hearing panel shall base its recommendation(s) solely upon the evidence heard. If the student is found guilty, the panel may refer to the student's record for guidance, but may not recommend a penalty more stringent than that originally recommended by the principal. The Superintendent if not a panel participant, shall be notified of the recommendation in writing not more than five school days after the hearing.

4. Disposition of Case – Decision in the case shall be made by the Superintendent within one week after receipt of the hearing panel's recommendation provided that such date does not fall beyond the second regular meeting of the Board held after the start of the suspension, in which case the decision must be rendered by the Board.

5. Appeal of Decision – A decision by the Superintendent may be appealed to the Board which shall review the decision in accordance with its rules and render a decision within 30

days of the request for appeal as made in writing to the Secretary.

The student shall remain in his/her regular school program pending disposition of the case, unless, in the judgment of the Child Study Team the student is a danger to himself or others. In that case, s/he shall be provided an alternate program of instruction suited to his/her needs and capabilities. Such program shall be implemented without undue delay.

6. Student's Record – Records of the suspension may not be made part of the student's permanent record and transcript. Record of the offense may be kept during the student's remaining school career only if the information is reasonably necessary for the student's welfare.

7. Waiver – It is the student's prerogative to waive his/her right to a formal hearing. This waiver is to be in writing and signed by both student and parents or guardian. The signatures should be witnessed. Additionally, the student can constructively waive the hearing by simply not availing him/herself of the opportunity for it, but such waiver cannot be construed before the passage of a considerable period of time, since it operates to close off the student's rights.

Plaintiffs' L. Civ. R. 56.1
Statement of Material Facts

Plaintiffs herewith submit the following Statement of Facts:

I. Background Facts Which Are Not Disputed:

1. On March 15, 2000 the minor plaintiff, A.G. was a kindergarten student at the Wilson Elementary School in Sayreville, New Jersey. *Defendants Statement of Facts ¶¶ 1, 11.*

2. A.G.'s school was a public school operated by the defendant Board of Education, defendant William Bauer was the Superintendent of Sayreville public schools and Dennis Fyffe (who is now Superintendent) was the Assistant Superintendent. *Defendants' Statement of Facts, ¶¶ 2,3,5.*

3. The principal of A.G.'s school was defendant Georgia Baumann. *Defendants' Statement of Facts, ¶¶ 4.*

4. On March 4, 2000, a Wilson student was suspended for 3 days for telling other children that he intended to "shoot the freaking teacher." *Defendants' Statement of Facts, ¶ 6.*

5. Also on March 4, 2000, another Wilson School student, in an unrelated incident, was suspended for 3 days after he threatened another student that he would put a gun in his mouth and kill him. *Defendants' Statement of Facts, ¶ 7.*

6. Also on March 10, 2000 another Wilson School student was suspended for 3 days after advising another student that his

mother allowed him to bring guns to school in his backpack. *Defendants' Statement of Facts, ¶ 8.*

7. On March 15, 2000, A.G. and three of his fellow students were each suspended for 3 days for conduct that occurred on the playground during a recess period. *Defendants' Statement of Facts ¶ 11,17.*

8. Prior to being suspended A.G. and his playmates were questioned by defendant Baumann about what had occurred. *Defendants' Statement of Facts ¶ 16.*

9. The suspensions of A.G. and his playmates were approved by Assistant Superintendent Fyffe and Superintendent Bauer. *Defendants' Statement of Facts ¶ 17.*

10. Prior to A.G. being sent home, defendant Baumann attempted to reach his parents by telephone to inform them of the incident and the suspension but was unable to reach them. *Defendants' Statement of Facts ¶ 20.*

11. A.G.'s parents were informed of the suspension by a letter from defendant Baumann which was sent home with A.G. *Defendants' Statement of Facts, ¶ 21.*

12. A.G. served the entire 3-day suspension and, after attending a "re-entry conference" with his parents was re-admitted to school and finished the year without incident. *Defendants' Statement of Facts, ¶ 22.*

II. A.G's Version of the "Incident" Which Materially Disputes the Contention That He and His Playmates Made "Threats

Concerning Weapons" and That These Threats "Frightened" Other Students.

13. During recess A.G., along with his friends Kyle, Justin and Mike, "were playing cops and robbers." *Deposition of A.G. 8-19 to 24, Affidavit of Daily, Exhibit A.*

14. This was a "make believe game" in which the boys "were using their fingers to play out the game." *Plaintiffs' Answer to Defendants' Interrogatories, #11, Affidavit of Daily, Exhibit B.*

15. Michael, Kyle and Justin, while playing said to each other, "Watch out. We got bazookas." *Deposition of A.G., 8-25 to 9-1, Affidavit of Daily, Exhibit A.*

16. During this game A.G. said to his friends, "I'm going to shoot you." *Deposition of A.G., 11-19 to 22, Affidavit of Daily, Exhibit A.*

17. After they were done playing a girl in A.G.'s class named Taylor, who had been "just" watching them, went and told a teacher what they had been doing. *Deposition of A.G., 9-13 to 10-1, Affidavit of Daily, Exhibit A.*

18. Other than Taylor there were no kids around since "They were all playing with stuff." *Deposition of A.G., 11-23 to 12-6, Affidavit of Daily, Exhibit A.*

19. After Taylor reported them to a teacher, that teacher took them from recess to the principal. *Deposition of A.G., 9-12 to 16, Affidavit of Daily, Exhibit A.*

20. The teacher to whom Taylor reported their conduct and took to the principal was not Miss McKenna their kindergarten teacher. *Deposition of A.G., 14-11 to 15-1, Affidavit of Daily, Exhibit A.*

21. Although the defendants now claim as justification for their actions that "several students" heard the "threats" and "expressed anxiety" and "were frightened" by them, *Defendants' Statement of Facts, ¶¶ 13, 14, 15*; the original handwritten notes of defendant Baumann, made at the time she interviewed and suspended A.G., make no mention of such information and only document that A.G. admitted he said, "Boom - pointed finger & said boom - I'll have a bazooka." *Affidavit of Daily, Exhibit C.*

22. In addition the letter sent home with A.G. limited its context to his actions with the three other playmates - "Anthony was involved with three other children in an episode on the playground. At that time he told the children that "Boom I have a bazooka and I want to shoot you." (Emphasis supplied.) *Affidavit of Daily, Exhibit D.*

23. The defense contention that A.G. and three playmates so frightened the other children as to cause a disruption of the educational process is based solely on hearsay information purportedly provided to defendant Baumann by Ms. McKenna and some of the children that Baumann supposedly subsequently talked to. *Deposition of Baumann, 38-9 to 44-3, Defendants' Brief, Exhibit G.*

24. Defendant Baumann admits that McKenna wasn't present at the time the statements were purportedly heard by the

"frightened" children. *Deposition of Baumann, 38-21, Defendants' Brief, Exhibit G.*

25. The defense contention that A.G. and three playmates so frightened other children as to cause a disruption of the educational process is further brought into issue by the fact that defendant Baumann was unable to remember the names of any of the children who supposedly confirmed to her that they had heard the remarks of the boys. *Deposition of Baumann, 50-6, Defendants' Brief, Exhibit G.*

26. The defense contention that A.G. and three playmates so frightened the other children as to cause a disruption of the educational process is further brought into issue by the fact that Dawn Myatt, (the PTA/Board of Education Liason Officer and an employee of the defendant Board in a "para-professional" capacity, *Deposition of Myatt, 8-3 to 21, Affidavit of Daily, Exhibit E*) who also claimed that quite a few "other kids and their parents" told her that the "children were frightened," *Deposition of Myatt, 12-5 to 12, Affidavit of Daily, Exhibit E.*; also had a memory lapse when requested to name any persons who gave her such information: "Q. You can't remember the name of not one of the people that told you that? A. Correct." *Deposition of Myatt, 16-14 to 16, Affidavit of Daily, Exhibit E.*

27. Although defendant Baumann testified that she didn't know that A.G. and his friends were playing a game of cops and robbers since "that is not as – it was not portrayed to me in that fashion," *Deposition of Baumann, 75-3 to 12, Defendants' Brief, Exhibit G*; Defendant Bauer testified that when she called him to inform him about her intended course of action

"she indicated that apparently there were boys playing cops and robbers." *Deposition of Bauer, 48-12 to 13 & 52-11 to 14, Affidavit of Daily, Exhibit E.*

28. Defendant Baumann admits that she concluded prior to suspending A.G. and his three playmates that these boys had not issued threats to any of their classmates nor had any intent to cause physical harm. *Deposition of Baumann, 47-15 to 48-3, Defendants' Brief, Exhibit G.*

III. The Individual Defendants' Actions Were Pursuant to an Established Policy, Custom or Practice and as Final Decisionmakers.

29. In her letter of March 10, 2000, Baumann initially informed parents that it was being written because of concerns over a student who made a "reference" to weapons and then explicitly stated that, "statements in which reference is made to violence or weapons" were serious matters and that "immediate disciplinary action will be taken." (Emphasis supplied.) *Defendants' Brief, Exhibit F.*

30. This letter of March 10, 2000, was read and approved by Superintendent Bauer before it was published by defendant Baumann. *Deposition of Baumann, 88-15 to 89-23, Defendants' Brief, Exhibit G.*

31. Although the three prior incidents involving specific threats to do harm to other students or bring a weapon to school were of greater gravity than A.G.'s, *Defendants' Statement of Facts, ¶¶ 6,7,8*; and there were no aggravating factors to support an enhanced punishment for him, *Deposition of Baumann, 114-*

10, Defendants' Brief, Exhibit G; the punishment was exactly the same. *Deposition of Baumann, 107-15 to 16, Defendants' Brief, Exhibit G.*

32. Defendant Baumann did not require the approval of the Superintendent in order to suspend students in her school. *Deposition of Bauer, 49-9 to 11, Affidavit of Daily, Exhibit E.*

33. When suspensions occur, however, they are always reported to the Board. *Deposition of Fyffe, 143-8 to 10, Affidavit of Daily, Exhibit F.*

34. Defendant Baumann in suspending A.G. for 3 days was following the Board's Policy #525 which provided: "The Board requires each student of this district to adhere to the rules and regulations promulgated by the administration and to submit to such disciplinary measures as are appropriately assigned for infractions of those rules...Disruptive pupils in the secondary grades will be disciplined in accordance with Board policy on suspension and expulsion. Disruptive pupils in the elementary grades will be reported to the building principal, who may discipline the pupil in accordance with this policy." (Emphasis supplied.) *Defendants' Brief, Exhibit H.*

35. Defendant Baumann testified that she understood the "this policy" language set forth above referred to as Policy #525. *Deposition of Baumann, 97-17 to 19, Defendants' Brief, Exhibit G.*

36. Policy #529 (which defendants now claim was in part "relied upon" by defendant Baumann, *See Defendants' Statement of*

Facts, ¶ 18) was the Board's Policy on Suspension and Expulsion, however, since A.G. was not a secondary pupil according to Policy #529 did not apply to him and therefore he was suspended solely under the authority granted defendant Baumann by Policy #525. *Policies #525, #529, Defendants' Brief, Exhibit G.*

37. Policy #529 (which per #525 governed secondary school students only) provided that "no student otherwise eligible for attendance at the schools of this district shall be excluded from school unless that student has materially and substantially interfered with the maintenance of good order in schools." *Policies #525, #529, Defendants' Brief, Exhibit G;* and this standard and language is verbatim the standard of the Supreme Court as set forth in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 512.

38. By not making the standards incorporated in Policy #529 applicable to elementary students such as A.G., the defendant Board vested discretionary authority in the "administration" to promulgate "rules and regulations" concerning student conduct and to submit elementary students to "such disciplinary measures" including suspension as the administration deemed appropriate for a violation of such rules and thereby allowed the promulgation of a zero tolerance policy which would not include the constitutional standard. *Policies #525, #529, Defendants' Brief, Exhibit G.*

39. Dawn Myatt testified that after the incident involving A.G., she spoke to a Jennifer Micale who was a reporter with the Suburban newspaper and subseqently there appeared an article in which she was "misquoted." *Deposition of Myatt, 32-21 to*

25, Affidavit of Daily, Exhibit E.

40. After identifying the article Myatt admitted that she in fact spoke to the reporter about the incident involving A.G. and the school's reaction to it and that she was properly quoted in the article as to her status as past PTA president, *Deposition of Myatt, 32-15 to 33-22, Affidavit of Daily, Exhibit E;* as to her understanding as to what the children had been doing at the time of the incident, *Deposition of Myatt, 33-23 to 25, Affidavit of Daily, Exhibit E;* that the support for the principal was "100%," *Deposition of Myatt, 34-22 to 25, Affidavit of Daily, Exhibit E;* and as to her view that "if it were my kid, I would expect him to be suspended." *Deposition of Myatt, 35-19 to 36-1, Affidavit of Daily, Exhibit E.*

41. Myatt also admitted that "policy" was discussed with the reporter but denied that she made any reference to a "zero tolerance policy." *Deposition of Myatt, 35-19 to 36-1, Affidavit of Daily, Exhibit E.*

42. In the aforesaid article it is documented that Myatt stated, "We do have a zero tolerance policy. Mrs. Baumann followed it to a T." *Affidavit of Daily, Exhibit G.*

43. At the time she spoke to the reporter Myatt had been employed by the Board since May 18th of '98 as a teacher's aide. *Deposition of Myatt, 13-23 to 14-2, Affidavit of Daily, Exhibit E.*

44. At the time she spoke to the reporter Myatt was not only a school employee but also the "Board of Ed Liason" for the PTA which position involved "going to the meetings [and]

finding out...what the Board is doing and how it affects the students." *Deposition of Myatt, 7-8 to 8-21, Affidavit of Daily, Exhibit E.*

45. At the article came out, "the principal" gave orders to Myatt and other employees that "nobody talk to reporters." *Deposition of Myatt, 15-3 to 5, Affidavit of Daily, Exhibit E.*

46. In respect to Myatt's statement in the article that: "We do have a zero tolerance policy. Mrs. Bauman followed it to a T;" defendant Baumann admitted that she had conversations with Myatt about it, *Deposition of Baumann, 125-2 to 20, Defendants' Brief, Exhibit G;* and testified "I know she said that," *Deposition of Baumann, 124-25, Defendants' Brief, Exhibit G.*

47. Defendant Bauer identified an article from the Newark Star Ledger about the incident and admitted speaking to the reporters who wrote it, *Deposition of Bauer, 77-25 to 79-25, Affidavit of Daily, Exhibit E;* and testified that he was accurately quoted as saying "We have consistently taken every statement, every comment as a serious matter. We will be in the process of reviewing this policy. But given the apparent access to weapons, we still have to take every one of these incidents very seriously." (Emphasis supplied.) *Deposition of Bauer, 80-6 to 13, Affidavit of Daily, Exhibit E.*

48. Defendant Bauer denied that he told the reporters that "officials will examine the district's zero tolerance policy as it relates to children as young as the four kindergartners." *Deposition of Bauer, 79-21 to 80-1, Affidavit of Daily, Exhibit E.*

49. According to the article, "Braced with the criticism, Superintendent William Bauer said officials will examine the district's zero tolerance policy as it relates to children as young as the four kindergartners but he stopped short of calling the suspensions a mistake." (Emphasis supplied.) *Affidavit of Daily, Exhibit H.*

50. The reporters who wrote the articles quoting Myatt and Bauer have stated that they will invoke New Jersey's Shield Law and therefore they are unavailable as witnesses. *Affidavit of Murphy.*

51. In interrogatory answers the defendants set forth that: "The March 15, 2000, incident was dealt with in the matter already established with regard to threatening behavior or statement." *Defendants Answer to Plaintiffs' Interrogatories, #17, Affidavit of Daily, Exhibit I.*

52. After learning of the suspension, A.G.'s father contacted defendant Bauer and, after he told him that he didn't agree with what had occurred to his son who was only 5, Bauer responded "that his hands were tied, policy was policy and he has to stand behind the decision of the principal." (Emphasis supplied.) *Deposition of S.G., 151 -2 to 12, Defendants' Brief, Exhibit I.*

53. At the "re-entry" meeting between defendant Baumann and A.G.'s parents, Baumann specifically stated that the suspension was pursuant to a zero tolerance policy that did not take into account any mitigating circumstances such as the age of the child:

A. "I had asked someone what the policy was, and I'm not sure if it was Mr. Bauer or Miss Baumann but I was quoted a – I think it was the zero tolerance policy and –
Q. In those words were you quoted that? Is that a quote? Did somebody actually say there was a zero tolerance policy?
A. Yes, yes.
Q. And
A. Actually, I believe it was Mrs. Baumann who said that, that it was a zero tolerance policy – zero tolerance, something of that nature. And I had actually requested a copy of it. Never got it. I also requested a copy of Anthony's, uh, transcript. Never got that, either, because curiosity, being told it wasn't going to be there, wanted to see.
Q. You said that it was Mrs. Baumann who told you this?
A. Yes. Actually, I jumped ahead a little to the reentry meeting.
Q. Okay. That was during the reentry meeting?
A. Yes."

Deposition of S.G., 153-4 to 154-1, Defendants' Brief, Exhibit I.; and,

Q. "Before you said that she talked specifically about the policy, and was that during the conversation at the reentry meeting?
A. Yes.
Q. And to whom were those statements made?
A. My wife and myself.
Q. What was said?
A. Uh, that's where she had said that this – this, uh, zero tolerance policy, that's where that was kind of thrown I

guess – there was no definition of it, that this incident basically falls under this. I believe that's when I requested the copy of the policy, 'cause I needed to see it in writing to see how this falls under the guidelines of this so-called policy.

Q. And did she use the exact term "zero tolerance"?

A. Yes."

Deposition of S.G. 162-23 to 163-2, Defendants' Brief, Exhibit I.

A. "Then my wife asked her, you know, on – the conversation went on. My wife continued with asking her questions basically of what do you think the children gained from this. And she actually said nothing, that they couldn't comprehend it." (Emphasis supplied.)

Deposition of S.G., 162-23 to 163-2, Defendants' Brief, Exhibit I.

IV. Additional Material Facts Relevant to the Issues in Dispute

54. A.G. did not hear the warnings about weapons and violence given to each class by defendant Baumann and his parents did not receive her letter of March 10, 2000, because he was out with Strep throat for three days and the Friday when that occurred was one of those days. *Deposition of C.G., 41-25 to 42-18, Defendants' Brief, Exhibit I.*

55. After calling Superintendent Bauer, A.G.'s parents did not attempt to further contest his suspension because, "he got sent home with a letter saying your son's suspended. We called

Mr. Bauer who was the top of the list and we were shot down, so it was a done deal." *Deposition of C.G., 76-8 to 17, Defendants' Brief, Exhibit I.*

56. According to his mother, A.G. "wanted to go to school. He didn't understand why he couldn't go to school," *Deposition of C.G., 81-24 to 25, Defendants' Brief, Exhibit I.;* and as a result of the suspension, "was upset. He goes to school. 'What do you mean, I can't go?'" and was upset for all three days of his suspension. *Deposition of C.G., 82-2 to 6, Defendants' Brief, Exhibit I.*

57. Although the record of A.G.'s infraction and suspension were not made part of his "permanent scholastic record," *Deposition of Baumann, 52-7, Defendants' Brief, Exhibit G;* they were recorded in a "separate file" where "by law...infractions may be recorded and may be maintained by the principal," *Deposition of Baumann, 52-10 to 13, Defendants' Brief, Exhibit G;* such file for the school year of A.G.'s infractions is still maintained pursuant to a policy to "keep them on file for a number of years." *Deposition of Baumann, 54-5 to 13, Defendants' Brief, Exhibit G;* and that information in the file would upon request be disclosed to a principal of a subsequent school attended by a student identified in the disciplinary file. *Deposition of Baumann, 54-15 to 56-17, Defedants' Brief, Exhibit G.*

58. Dennis Fyffe, who is now the Superintendent, testified that during his educational career as a preschool teacher for two years, an English teacher for two and a half years, a director of research and development, for five years, an assistant principal for seven years and a principal for eleven years, he had never

heard of a kindergartner being suspended for three days. *Deposition of Fyffe, 148-1 to 22, Affidavit of Daily, Exhibit F.*

59. Defendant Bauer testified that in his 37 years as an educator he could not recall suspensions to kindergartners prior to those involving Defendant Baumman. *Deposition of Bauer, 57-18 to 25, Affidavit of Daily, Exhibit E.*

RESPECTFULLY SUBMITTED,

QUINLAN, DUNNE & DAILY, P.A.
BY: F. MICHAEL DAILY, JR.,
Attorney for plaintiffs

December 29, 2001

STATEMENT OF FACTS
PURSUANT TO L. CV. R. 56.1

1. At all times asserted herein, the minor plaintiff, A.G., was a kindergarten student at the Wilson Elementary School in Sayreville, New Jersey. (See Plaintiffs' Complaint, Exhibit A)

2. At all times asserted herein, the Wilson School and all other Sayreville township Public Schools were administered by the Defendant, Sayreville Board of Education. (hereinafter referred to as "the Board") (See Plaintiffs' Complaint, Exhibit A)

3. At all times asserted herein, Defendant William Bauer was employed by the Board as the Superintendent of the Sayreville Public Schools. (See Plaintiffs' Complaint, Exhibit A)

4. At all times alleged herein, Defendant Georgia B. Baumann was employed by the Board as the principal of the Wilson School. (See Plaintiffs' Complaint, Exhibit A)

5. At all times asserted herein, The Board employed Dennis Fyffe as its Assistant Superintendent. Mr. Fyffe has since become the Superintendent. (See Transcript of Deposition of Dennis Fyffe, p132, ll.19-24, Exhibit B)

6. On March 4, 2000, a student at the Wilson School told other children in the morning playground line that he would "shoot the freaking teacher." The student who made the statement was suspended from school for three days. (See Letter of Georgia Baumann, dated March 4, 2000, Exhibit C).

7. In another incident that took place on March 4, 2000, a student

at the Wilson School told a fellow student that he would put a gun in the child's mouth and kill him. The student making the statement was suspended from school for three days. (See Letter of Georgia Baumann, dated March 4, 2000, Exhibit D)

8. On March 10, 2000, a student at the Wilson School stated to another child, "My Mommy lets me bring guns to school in my backpack." The student that made the statement was also suspended for three days. (See Letter of Georgia Baumann, dated March 13, 2000, Exhibit E).

9. In response to these incidents, Principal Baumann sent home with students a letter acknowledging expressions of concern made by parents after a newspaper article was published about one of the incidents above. The letter assured parents that steps were being taken to display the schools intent to take an "active stance" with regard to such matters. Principal Baumann further advised parents that she would visit each classroom in the Wilson School to discuss with students the seriousness of making statements regarding violence and weapons, as well as the consequences of making such statements. In part, the letter advised:

> I ask your cooperation in discussing with your children the inappropriateness of this type of behavior. They must understand that immediate disciplinary action will be taken.
>
> Please be assured that the safety of your child is of the utmost importance to us and that we are ever vigilant with regard to inappropriate or unsafe statements and behaviors.

(See Letter of Georgia Baumann, dated March 10, 2000,

Exhibit F)

10. Ms. Baumann visited each classroom in the Wilson School on March 10, 2000, and discussed with students the seriousness of making statements regarding violence and weapons, and the consequences thereof. Ms. Baumann tailored her statements to be appropriate to the grade level of each classroom she visited. (See excerpt from Transcript of Deposition of Georgia Baumann, p. 86, ll. 24-p. 87, l. 25, Exhibit G)

11. On March 15, 2000, A.G. became involved in an incident on the playground during the kindergarten students' recess period. (See Plaintiffs' Complaint, Exhibit A)

12. On March 15, 2000, the plaintiff, A.G., was at recess with three other kindergarten students, when they each began to make threats concerning weapons, and shooting each other. (See Transcript of Deposition of Georgia Baumann, Exhibit G, p. 35, l. 17 - p. 37, l. 23)

13. Several other kindergarten students heard the comments, and reported them to a teacher. The students expressed anxiety resulting from the threats made my plaintiff and the three other students. (See Transcripts of Deposition of Georgia Baumann, Exhibit G, p. 38, l. 24-25, p. 39, l. 1, . 5-17, p. 42, ll. 6-25)

14. The minor plaintiff and the three other students who had made the threats were accompanied by their teacher, Ms. McKenna, to the office of the principal, Ms. Baumann. (See Transcript of Deposition of Georgia Baumann, Exhibit G, p. 36, ll. 5-10)

15. While at the office, Ms. McKenna advised Defendant Baumann

that the students who overheard these threats were frightened. (See Transcript of Deposition of Georgia Baumann, Exhibit G, p. 36, l. 15 - p. 38, l. 2)

16. A.G. and the other students confirmed that they made these threats. (See Transcript of Deposition of Georgia Baumann, Exhibit G, p. 42, l. 16 - p. 44, l. 2)

17. After discussing the incident and the appropriate disciplinary measures to be taken with Assistant Superintendent Fyffe and Superintendent Bauer, Ms. Baumann suspended the plaintiff and the other involved students for three days. (See Transcript of Deposition of Georgia Baumann, Exhibit G, p. 42, l. 16 - p. 44, l. 2, and Transcript of Deposition of Dennis Fyffe, Exhibit B, p. 134, l. 9 - p. 137, l. 19)

18. In making the decision with regard to the suspension of the plaintiff, Principal Baumann relied on Sayreville Board of Education Policy Number 525 and 529 (See Transcript of Deposition of Georgia Baumann, Exhibit G, p. 92, l. 11 - p. 99, l. 20)

19. Sayreville Board of Education Policy Number 525 provides standards of expected student behavior, as well as guidelines for disciplining students in the district. (See Sayreville Board of Education Policy Number 525 and 529, Exhibit H)

20. Ms. Baumann called all of the parents of the three students who made the threats to inform the parents of the incidents and suspensions. After failing to reach the minor plaintiff's parents via telephone at their places of work, Ms. Baumann left a detailed message concerning the incident with the plaintiff's

grandmother, with whom the plaintiff and his parents resided at the time of the incident. In her message, Ms. Baumann requested that the plaintiff's parents contact her as soon as possible. (See Transcript of Deposition of Georgia Baumann, Exhibit G, p. 108, l. 12 - p. 109, l. 10)

21. Ms. Baumann informed the suspended students' parents of the incident and resulting punishment by sending a letter home with each of the students. (See Letters of March 15, 2000, Exhibit I)

22. After serving the three-day suspension, and attending a required re-entry conference with Defendant Baumann, A.G. returned to school and finished the year without an incident. (See Letter of Georgia Baumann, dated March 15, 2001, Exhibit I and See Transcript of Deposition of Georgia Baumann, Exhibit G, p. 109, l. 7-12)

23. The minor plaintiff was given the class assignments for the period during which his suspension was in effect, and he completed the assignments. (Transcript of Deposition of S.G., Exhibit K, p. 106, l. 21 - p. 107, l. 23)

24. The plaintiff had no long term difficulty in school due to his suspension. (Transcript of Deposition of S.G., Exhibit K, p. 107, ll. 5-14)

25. The minor plaintiff became ill with strep throat during the suspension period. He was sick for two of the three days of his suspension, and stayed home from school an extra day due to illness. (Transcript of Deposition of S.G., Exhibit K, p. 66, l. 3 - p. 67, l. 11)

26. On or about June 1, 2000, the Plaintiffs filed the present action. (See Complaint, Exhibit A)

27. Plaintiff's complaint seeks redress pursuant to 42 U.S.C.A. §1983 for the alleged violation of certain of the plaintiffs' constitutional rights. The specific causes of action allege violation of the following constitutional rights:

a) Count One: The right of Freedom of Speech as secured by the First Amendment. (See Plaintiffs' Complaint, ¶¶ 25-30, Exhibit A)

b) Count Two: The right to procedural Due Process of Law as secured by the Fifth and Fourteenth Amendments to the United States Constitution. (See Plaintiffs' Complaint, ¶¶ 31-34, Exhibit A)

c) Count Three: The right to substantive Due Process as secured by the Fourteenth Amendment to the United States Constitution. (See Plaintiffs' Complaint, ¶¶ 35-37, Exhibit A)

d) Count Four: The right to Equal Protection of the law as secured by the 14th Amendment to the United States Constitution. (See Plaintiffs' Complaint, ¶¶ 38-40, Exhibit A)

Respectfully submitted,
MARKS, O'NEILL, O'BRIEN & COURTNEY, P.C.

BY: JACQUELINE V. MCDONALD, ESQUIRE
Attorney for Defendants,
Sayreville Board of Education, Georgia B. Baumann and William Bauer

WILSON SCHOOL
65 Dane Street
Sayreville, NJ 08872

March 15, 2000

TO: The parents of A[redacted] G[redacted]

RE: Suspension

As per our conversation, A[redacted] was involved with three other children in an episode on the playground. At that time, he told the children that, "Boom! I have a bazooka and I want to shoot you."

I have spoken with each class and sent home a letter regarding the seriousness of these kinds of statements. They are construed as threats whether or not the child may think he or she is playing. Both Mrs. McKenna and I stressed this during my talk with her class on Friday.

As a result, I am suspending A[redacted] for three days, March 16, 17 and 20, 2000. On Tuesday morning as per our policy, he will be readmitted to school following a re-entry conference.

Very truly yours,

Georgia B Baumann

Georgia B. Baumann
Principal

11

BEST AVAILABLE COPY

WILSON SCHOOL
65 Dane Street
Sayreville, NJ 08872

March 15, 2000

TO: The parents of J[redacted]

RE: Suspension

As per our conversation, J[redacted] was involved with three other children in an episode on the playground. At that time, he told the children that, "I have a gun in my pocket and I'll shoot you."

I have spoken with each class and sent home a letter regarding the seriousness of these kinds of statements. They are construed as threats whether or not the child may think he or she is playing. Both Mrs. McKenna and I stressed this during my talk with her class on Friday.

As a result, I am suspending Justin for three days, March 16, 17 and 20, 2000. On Tuesday morning as per our policy, he will be readmitted to school following a re-entry conference.

Very truly yours,

Georgia B. Baumann
Principal

12

WILSON SCHOOL
65 Dane Street
Sayreville, NJ 08872

March 15, 2000

TO: The parents of N[redacted] M[redacted]

RE: Suspension

As per our conversation, N[redacted] was involved with three other children in an episode on the playground. At that time, he told the children that, "I have a bazooka and I want to shoot Justin"

I have spoken with each class and sent home a letter regarding the seriousness of these kinds of statements. They are construed as threats whether or not the child may think he or she is playing. Both Mrs. McKenna and I stressed this during my talk with her class on Friday.

As a result, I am suspending N[redacted] for three days, March 16, 17 and 20, 2000. On Tuesday morning as per our policy, he will be readmitted to school following a re-entry conference.

Very truly yours,

Georgia B Baumann

Georgia B. Baumann
Principal

WILSON SCHOOL
65 Dane Street
Sayreville, NJ 08872

March 15, 2000

TO: The parents of M[redacted] C[redacted]

RE: Suspension

As per our conversation, M[redacted] was involved with three other children in an episode on the playground. At that time, he told the children that, "I have a gun and I'll shoot you."

I have spoken with each class and sent home a letter regarding the seriousness of these kinds of statements. They are construed as threats whether or not the child may think he or she is playing. Both Mrs. McKenna and I stressed this during my talk with her class on Friday.

As a result, I am suspending M[redacted] for three days, March 16, 17 and 20, 2000. On Tuesday morning as per our policy, he will be readmitted to school following a re-entry conference.

Very truly yours,

Georgia B. Baumann

Georgia B. Baumann
Principal

No. 03-441

Supreme Court, U.S.
FILED
NOV 24 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

S.G., as Guardian Ad Litem of A.G.,
a minor, and S.G., Individually,

Petitioners,

v.

SAYREVILLE BOARD OF EDUCATION,
GEORGIA B. BAUMANN and WILLIAM L. BAUER, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. THE QUESTIONS PRESENTED BY THE PETITION ARE NOT THE ISSUES DECIDED BY THE THIRD CIRCUIT 6

II. THIS CASE DOES NOT INVOLVE ANY NOVEL OR IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW 9

A. FIRST AMENDMENT 10

B. PROCEDURAL DUE PROCESS 19

III. CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Milbank School District, 197 F.R.D. 682 (D.S.D. 2000) 12

Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) 7

Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 453 (1982) 9

Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) 16

Fraser, 478 U.S. at 681, 106 S.Ct. 3159 ..... *passim*

Ginsberg v. City of New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) 11, 14

Goss v. Lopez, 419 U.S. 565 (1975) 7, 19, 20

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) 7, 12, 13, 14, 15

Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996) 15, 16

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) 11

Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) 17

Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) 11

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) 8

TABLE OF AUTHORITIES – Continued

Page

S.G. ex rel A.G. v. Sayreville Board of Education, 330 F.3d 417 (3rd Cir. 2003) ..... *passim*

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) 7, 12, 13, 14, 15

Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) 16

West v. Derby United School District, 206 F.3d 1358 (10th Cir. 2000) 12, 17

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) 10

STATUTES

42 U.S.C.A. §1983 9

COUNTERSTATEMENT OF THE CASE

On February 29, 2000, a six-year-old boy brought a gun to his elementary school in Flint, Michigan. Later that day, he shot and killed his six-year-old classmate while their teacher and class watched.

On March 4, 2000, a student at the Wilson Elementary School in Sayreville, New Jersey told other children in the morning playground line that he would "shoot the freaking teacher." The student was suspended for three days, received a consultation with the school psychologist and further conflict mediation with the school guidance counselor was recommended. Pet. App. H1, ¶ 6. In addition, outside psychological counseling for the student was recommended to his parents.

On the same date, a second student at Wilson Elementary told another child that he would put a gun in his mouth and kill him. The student who made the threat was suspended for three days, underwent a consultation with the school psychologist and the police were informed of the incident. Pet. App. H1, ¶ 7. In addition, psychological counseling was recommended to his parents. A few days later, on March 10, 2000, a third child at Wilson Elementary told another student that, "My Mommy lets me bring guns to school in my backpack." The student was suspended for three days, but no additional punishment was imposed. Pet. App. H2, ¶ 8.

After press coverage relating to one of the above-described incidents, defendant Georgia Baumann, principal of Wilson Elementary School, sent home with students

a letter to parents.[1] Pet. App. H2, ¶ 9. The letter, dated March 10, 2000, acknowledged parental concerns regarding the incident and attempted to reassure parents of the school's intent to take an "active stance" with regard to matters involving threats or statements about guns and violence in the school. In her letter, Principal Baumann asked parents to discuss with their children the inappropriateness of statements in reference to violence and weapons and the consequences resulting from making them. Principal Baumann advised that immediate disciplinary action would be taken in response to such behavior. Principal Baumann advised that she would be visiting each of the classrooms under her supervision to discuss the seriousness with which statements involving threats of guns or violence would be treated at Wilson School. The letter closed by assuring parents that their children's safety was of utmost importance, and that Wilson School would be "ever vigilant with regard to inappropriate or unsafe statements and behaviors." Pet. App. H2, ¶ 9. There was no Board "zero tolerance policy" contained in the letter. It is undisputed that there never was any policy issued by the Board establishing any "automatic" suspension or other "zero tolerance policy" relative to Petitioner's conduct.

As promised, Principal Baumann visited each classroom in the Wilson School on March 10, 2000. Tailoring her commentary to suit the age and grade level of the

[1] Although Plaintiffs assert that the minor plaintiff was absent from school on March 10, 2000 and that they did not receive a copy of this letter, teachers were instructed to send the letter home to absent students along with school assignments.

students, Principal Baumann discussed with the children the seriousness of making threats or statements about guns and violence, as well as the potential consequences thereof. Pet. App. H3, ¶ 10. On March 15, 2000, the minor plaintiff, A.G., was on the playground during his recess period with three other kindergarten students, when they began to make threats concerning weapons and shooting each other. Pet. App. H3, ¶ 11, ¶ 12. Other kindergarten children were frightened by the threats and reported them to a teacher.[2] Pet. App. H3, ¶ 13.

The kindergartner's teacher, Ms. McKenna, brought her class into the school after recess and then brought the plaintiff and the other students who made the gun-related threats to the principal's office. Pet. App. H3, ¶ 14. To do so, Ms. McKenna was forced to suspend lessons and find someone else to watch her class while she brought A.G. and the other involved children to the principal's office. Hence, Petitioner's assertion that there was no disruption is simply untrue. Not only were students upset, but the lessons in one class were suspended as a result of the ordeal.

Upon arriving at the principal's office, Ms. McKenna advised Principal Baumann about the threats. Ms. McKenna also advised that the other children were

---

[2] Petitioner's assertion that only one child overheard the comments is misleading. Principal Baumann testified during depositions that she personally spoke with several children who overheard plaintiff's gun-related comments and were frightened and upset by them. In fact, one child told his teacher that he felt he had been threatened by the minor plaintiff.

frightened and upset by the words of A.G. and his friends. Pet. App. H3-H4, ¶ 15.

Once he arrived at the Principal's office, the minor Petitioner was told why he was there and given an opportunity to give his side of the story. Principal Baumann asked A.G. and the other students if they made the comments as related by their teacher. Each of the boys, including A.G., confirmed making the statements. Pet. App. H4, ¶ 16. Principal Baumann also spoke with the children who reported the incident to Ms. McKenna, and confirmed that several children were upset and frightened by the threats. Principal Baumann testified during her deposition that it was clear to her that the plaintiff understood that he acted wrongly and upset his teacher and fellow students. In considering the appropriate punishment to be meted out with regard to the incident, Principal Baumann consulted with Defendant Superintendent William Bauer and Assistant Superintendent Dennis Fyffe. Pet. App. H4, ¶ 17. Principal Baumann took into consideration A.G.'s age and abilities in deciding his punishment. Ultimately, A.G. and the other students involved in the incident were suspended for three days.[3] Pet. App. H4, ¶ 17. There was no "automatic" suspension. No other punishment was imposed, such as referral to counseling or an outside psychologist or involvement of the police as was done in other similar cases.

---

[3] The only Board policies mentioned are 525 and 529, which simply convey general disciplinary authority to administrators. Petitioners have never challenged the constitutionality of these policies. Pet. App. H4, ¶ 19.

Although arguably not required to do so, principal Baumann attempted to reach A.G.'s parents via telephone at their places of business, but was unable to do so. Principal Baumann also telephoned the Petitioner's home number, and spoke with A.G.'s grandmother, with whom the Petitioners resided at the time of the incident. Principal Baumann left a detailed message for A.G.'s parents with his grandmother, asking them to contact her as soon as possible. Pet. App. H4-H5, ¶ 20. Petitioner returned in three days and finished the school year without incident.

The incident underlying this claim and the resultant punishment were never made a part of A.G.'s permanent record. Principal Baumann simply made a handwritten note of the incident on a personal legal pad that she kept in her desk.

Petitioners are incorrect in their recital of many facts in the record. By way of example, Petitioners make repeated reference to the existence of a "zero tolerance policy" of the Board. To the contrary, the Third Circuit properly found that there simply was no such Board policy. In fact, the Third Circuit specifically stated that Petitioner's claims below " . . . are not based upon any action by the Board." *S.G. ex rel A.G. v. Sayreville Board of Education*, 333 F.3d 417, 425 n.4 (3rd Cir. 2003) Pet. App. A15, n.4. Moreover, the Third Circuit properly held that the existence of a zero tolerance policy would not overcome qualified immunity in any event.

Similarly, Petitioners also claim that students were somehow "automatically" suspended by school officials. Petition at 3. This is not true and is not reflected in the record.

Likewise, Petitioner's reference to testimony by Dawn Myatt merits clarification. Dawn Myatt is neither a Defendant nor was she in any way involved in relevant parts of this case. She is simply a mother of a Sayreville student and a member of the P.T.A. Ms. Myatt testified during her deposition that she was simply misquoted by a reporter with regard to the comments cited by the Petitioners.[4] In any event, Ms. Myatt's comments regarding her understanding of school "policy" are of no legal relevance in this case. There is simply no Board policy at issue in this case.

Finally, there is no factual basis for Petitioner's bold assertion that "suspensions of younger students has become a more common place." Petition at 13. This is a clear attempt to give this case a gloss of significance where none is warranted.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED BY THE PETITION ARE NOT THE ISSUES DECIDED BY THE THIRD CIRCUIT

The Third Circuit did not issue the two holdings which Petitioners seek to review. In an attempt to gain this Honorable Court's attention, Petitioners assert that

[4] Similarly, Petitioner's repeated references to unsupported newspaper clippings referencing a "zero tolerance policy" are of no import. The Petitioner's self-serving reference to media coverage which they generated does not change the fact that discovery revealed that no relevant Board policy ever existed.

the Third Circuit created a "new standard" in First Amendment jurisprudence. Petition at 4. Nothing could be further from the truth. To the contrary, this Court simply applied the standards established by this Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), and reached the decision which is entirely in accord with established and controlling law.

Similarly, in the realm of procedural due process, Petitioners assert that this case has revealed a "critical gap" in constitutional jurisprudence relating to short term school suspensions. Petition at 4. To the contrary, the Third Circuit simply applied the well-established precedent applicable to short term suspensions established by this Court in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

What the Third Circuit did decide was simply that Defendants Baumann and Bauer were entitled to qualified immunity. *S.G. ex rel A.G. v. Sayreville Board of Education*, 333 F.3d at 425 n.4 (3rd Cir. 2003) Pet. App. 15, n.4. This holding, is not challenged by Petitioners.[5] Hence, there exists no valid basis for grant of the Petition.

To be sure, within the context of the two-pronged qualified immunity analysis, the Third Circuit examined

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[5] Similarly, the District Court and the Third Circuit Court dismissed Petitioner's Equal Protection Claim. Petitioners have not sought Writ consideration of this issue.

the threshold question of whether Petitioner's averments amounted to a violation of constitutional rights at all, and properly decided that they did not. The court also found that since there was no clearly established law, defendants were nonetheless entitled to qualified immunity. *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). In so doing, the Third Circuit followed the explicit holdings of this Court. There is no conflict with the present decision and any decisions of this Court or between the holdings of the Circuit Courts of Appeal. There is neither a gap in constitutional jurisprudence nor was a "new standard" created with regard to the issues presented in this case.

It is also significant that petitioners have never challenged below the constitutionality of any actual policy of the Sayreville Board of Education. Much was made of "zero tolerance policy" allegedly promulgated by the Sayreville School Board. However, discovery revealed that the Board simply had no such policy. The discipline of the minors in this case was carried out by Principal Baumann based on the totality of circumstances in this incident. Indeed, the Third Circuit explicitly did not address such an issue, holding " . . . [w]e *need not address his claims against the Board of Education. These claims are not based upon any action by the Board . . . " S.G. ex rel A.G. v. Sayreville Board of Education*, 333 F.3d 417, 425 n.4 (3rd Cir. 2003) Pet. App. A15, n.4. Hence, the only actionable claims are those against Principal Baumann and Superintendent Bauer for which the Third Circuit properly upheld a grant of qualified immunity.

At the end of the day, the relief Petitioner sought was to expunge a fictitious permanent record of A.G.'s punishment. As the Third Circuit pointed out, there is simply no

official record to expunge. The only record retained by anyone at the Sayreville Public School consists of some personal handwritten notes on a yellow legal pad made by Principal Baumann and kept in her top drawer. This perhaps best highlights the utter lack of any far-reaching constitutional implications arising from this matter.

II. THIS CASE DOES NOT INVOLVE ANY NOVEL OR IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW

This case began with a typical situation, which is repeated many times over on any given day in the nations school system. To wit; a child committed an infraction on the playground, admitted the behavior when questioned about it, and was punished accordingly. The Court is faced with no more and no less than that. This Court has long acknowledged the broad discretion of local school boards in the administration of school affairs. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 863, 102 S.Ct. 2799, 2806, 73 L.Ed.2d 453 (1982).

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public . . . school students do have substantive and procedural rights while at school. But §1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgement of school administrators and school board members and §1983 was not intended to be a vehicle for federal court correction

> of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.
>
> *Wood v. Strickland*, 420 U.S. 308, 326, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) (citations omitted).

Ignoring the words of this Court, Petitioners are seeking nothing less but to substitute their judgment or this Court's judgment for the judgment of the people who are charged with the day-to-day operation of the Sayreville Public Schools. The Petitioners simply wish to reverse a school discipline decision with which they disagree. While parents may often feel that in school, sport or life, their child was not treated fairly, § 1983 is not the intended vehicle for their dissatisfaction.

A. FIRST AMENDMENT

A group of five year olds were punished by their Principal for misbehaving.[6] This case presents nothing more. The decision by the Third Circuit is neither so novel nor so compelling as to warrant this Court's review. To the contrary, the decision is well-grounded in the established First Amendment precedent of this Honorable Court and is not in conflict with any decisions.

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[6] As referenced earlier, the punishment was issued by principal Baumann after consulting with colleagues Fyffe and Bauer. There was no Board policy mandating an automatic suspension. However, the Third Circuit pointed out that, even assuming that the conduct of Baumann is viewed as a "policy" of the school, qualified immunity still applied, since there was no clearly established law prohibiting punishment of such threats.

In the first instance, the petition is fatally flawed since it is based on the false premise that this playground incident is one involving "expressive" speech, ideas, or viewpoints. Petition at 14, 15. This fallacy is a readily transparent effort to gain this Honorable Court's attention and should be rejected. The Third Circuit examined the record and recognized that this case simply does not involve "expressive speech." Rather, the children made threats to shoot each other. Indeed, one would be hard-pressed to present an example of less expressive speech from a First Amendment perspective than the conduct in this case. Indeed, it is inconsistent for Petitioners to argue that these children were involved in some sort of expressive speech, yet, in the context of their procedural due process argument, state that the children had no comprehension of the meaning of their conduct.

The parameters of First Amendment rights in the setting of the nation's public schools are well-defined by this Court and were properly applied by the Third Circuit in affirming the District Court's grant of Summary Judgment. Although minors enjoy the protections of the United States Constitution, the United States Supreme Court has recognized "that the State has somewhat broader authority to regulate the activity of children than of adults." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75, 96 S.Ct. 2831, 2844, 49 L.Ed.2d 788 (1976) (citing *Prince v. Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 444, 88 L.Ed. 645 (1944); *Ginsberg v. City of New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). That the constitutional rights of minors are not coexistent with those of adults is illustrated particularly well within the context of the nation's public schools. This Court has "repeatedly emphasized the need for affirming the

comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker*, 393 U.S. at 507.

> The constitutional rights of public school students are not automatically coextensive with the rights of adults in other settings, and a school need not tolerate speech that is inconsistent with its pedagogical mission, even though the government could not suppress the speech outside of the schoolhouse.

Anderson v. Milbank School District, 197 F.R.D. 682, 686 (D.S.D. 2000) (quoting *Fraser*, 478 U.S. at 682).

Hence, it is similarly well established that "the First Amendment Rights of students in public schools . . . must be applied in light of the special characteristics or the school environment." *Hazelwood*, 484 U.S. at 266. In accordance with these principles, "where school authorities reasonably believe that a student's uncontrolled exercise of expression might substantially interfere with the work of the school or impinge upon the rights of other students, they may forbid such expression." *West v. Derby United School District*, 206 F.3d 1358 (10th Cir. 2000) (quoting *Tinker*, 393 U.S. at 509).

Far from conflicting with this Honorable Court's prior decisions regarding students' free speech rights, the Third Circuit specifically evaluated the facts herein within the context of *Tinker*, *Fraser* and *Hazelwood*. After so doing, the Circuit Court concluded that there was no threshold showing of a violation of A.G.'s First Amendment rights. *S.G. ex rel A.G.*, 330 F.3d at 422. In so concluding, the Third Circuit held that "the school's prohibition of speech

threatening violence and the use of firearms was a legitimate decision related to reasonable pedagogical concerns and therefore did not violate A.G.'s First Amendment rights." *S.G. ex rel A.G.*, 330 F.3d at 423.

The *Tinker* Court expressly distinguished the regulation of "direct, primary First Amendment rights akin to 'pure speech'" from the regulation of issues of deportment and aggressive, disruptive actions by students. *Tinker*, 393 U.S. at 506-08. These issues were also addressed in *Fraser* and *Hazelwood*, as noted in the decision of the Third Circuit.

> The Supreme Court has recognized that a balance must be struck between the student's rights and the school's role in fostering what the Court in *Fraser* termed "socially appropriate behavior." *Fraser*, 478 U.S. at 681, 106 S.Ct. 3159. Here, where the school officials determined that threats of violence and simulated firearm use were unacceptable, even on the playground, the balance tilts in favor of the school's discretionary decision-making.

S.G. ex rel A.G., 330 F.3d at 422.

The Court below simply followed the dictates of *Fraser* and held that it need not decide

> whether or if, under what circumstances, a school may violate an elementary school student's right to freedom of speech. For our purposes it is enough to recognize that a school's authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting.

Id. at 423.

The decision below is consistent with the opinions of this Court and the Circuit Courts of Appeals that have addressed the issue of First Amendment rights in the nation's public schools insofar as the age of the student is concerned. This Court has recognized that the maturity level of the target audience in cases involving student speech will play a factor in the consideration of school official's regulation of it. That the maturity of the student audience might prove important in First Amendment analysis was first hinted in *Tinker*, where Justice Stewart, concurring in the result, reiterated sentiments expressed in a prior opinion that a state could determine that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (citing *Ginsberg v. New York*, 390 U.S. 629, 649-50, 88 S.Ct. 1274, 1285-86, 20 L.Ed.2d 195 (Stewart, J., concurring)).

The reference to audience maturity contained in Justice Stewart's concurring opinion in *Tinker* was made more explicit in the majority opinions in *Fraser* and *Hazelwood*. Confronted by a high school student's sexually charged speech made to an audience composed of fellow pupils, the maturity level of that audience was central to the reasoning of the *Fraser* Court. The Court specifically noted that the speech at issue "could well be seriously damaging to its less mature audience, many of whom were only 14 years old at the time and on the threshold of awareness of human sexuality," and held that the discipline imposed on the speaker was constitutional. *Fraser*, 478 U.S. at 633.

The *Hazelwood* Court, in upholding a school's decision to excise certain material from a student-published school newspaper, expressly stated that regulation of school

sponsored speech was acceptable to ensure that "readers or listeners are not exposed to material that may be inappropriate *for their level of maturity*." *Hazelwood*, 484 U.S. at 271 (emphasis added).

Circuit Courts of Appeals have followed suit with this Honorable Court's decisions evaluating First Amendment challenges within the nation's schools in light of the maturity of the student population. The interplay of *Tinker*, *Hazelwood*, and *Fraser* as to the relevance of age in the consideration of the First Amendment rights of students was considered by the Seventh Circuit Court of Appeals in *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996). In weighing an elementary student's challenge to school restrictions placed on the student's ability to disseminate invitations to a religious meeting, the *Muller* Court acknowledged that the Supreme Court has not expressly extended to grade school children the free expression rights first announced in *Tinker*. *Id.* at 1538. Following precedent established by this Court, the *Muller* Court explained

> Age is an important factor in student speech cases. . . . If a high school can suppress speech to protect 14-year-olds from sexual innuendo at a voluntary school assembly (*Fraser*), and if it can delete entire pages from a school newspaper because they touch on 'sensitive topics' (*Hazelwood*, 484 U.S. at 272, 108 S.Ct. at 570) it follows that a public elementary school can shield its five through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development. The 'marketplace of ideas,' an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the

> means of expression. Grammar schools are more about learning, including learning to sit still and be polite, than about robust debate.

Muller, 98 F.3d at 1538.

The rationale of the *Muller* Court recalls that of *Fraser*, wherein the Supreme Court found the mission of the public schools to instill socially appropriate behavior and moral standards central to its ruling. That elementary school students' First Amendment rights are more amenable to regulation than those of their older counterparts makes sense on this level as well. Students who are still learning the basic concepts of behavior and social interaction should be subject to discipline in a way that will ensure that this mission is achieved. As noted by the *Muller* Court

> the "verbal cacophony of a public forum, can be antithetical to the delicate "custodial and tutelary" environment of an elementary school. The cultivation of the "habits and manners of civility" that *Fraser* held "essential to a democratic society," can require a level of parentlike guidance that has no place in a public forum. Declaring the elementary school classroom, hallway, or playground forums for unfettered student communication would require either a severe incursion into the critical educational mission of the elementary school or a substantial contraction of the First Amendment protections afforded speech in a public forum.

Muller, 98 F.3d at 1539 (quoting *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 655, 115 S.Ct. 2386, 2392, 132 L.Ed.2d 564 (1995); *Fraser*, 478 U.S. at 681)

Other Circuit Courts considering student speech have been consistent with this notion. *See*, e.g., *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) ("schools must teach by example the shared values of a civilized social order." *Fraser*, 478 U.S. at 683; *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000).

Hence, even if this case dealt with political viewpoints or opinions, which it does not, the Third Circuit properly invoked the guidance of this Honorable Court in *Fraser*, when it held that "The First Amendment guarantees wide freedom in matters of *adult* public discourse," but cautioned that "it does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school." *Fraser*, 748 U.S. at 682. The holding of *Fraser* has even greater applicability here where we are dealing with 5 year old children.

In an additional attempt to convert the mundane to the extraordinary, Petitioners attempt to raise the alarm that schools are now heading down the slippery slope of pressing "an agenda of pacifism at a time when American soldiers are being killed in far away lands." Petition at 15. Following this logic, Petitioner would have this Court hold that kindergarten teachers should likewise refrain from requiring children to sit quietly in their seats, avoid shooting spitballs, or calling each other names at the risk of indoctrinating pacifism or be subject to lengthy litigation.

Petitioner seems to contend that it is a novel concept that the educators of very young children have, as one of their missions, the goal of fostering "socially appropriate

behavior". To the contrary, this Court in *Fraser* recognized ". . . . society's countervailing interest in teaching students the boundaries of socially acceptable behavior" *Fraser*, 478 U.S. at 681. In the case at hand, the Defendants were faced with the nationally publicized murder of a first grader by another first-grader in Michigan and, in Defendant's very own school, three other recent incidents involving threats made by students regarding the use of guns and violence. It is misguided to suggest that a case of constitutional proportions is raised when a fourth group of children is punished for frightening others by stating "I am going to shoot you". This is not a case involving "core", "political" speech or "viewpoints". This is a case about children threatening to shoot each other on a playground which understandably frightened other children given the tragic events that had occurred in the preceding weeks.

Petitioners have raised hypothetical situations seeking to avoid the undisputed facts at hand. By way of example, Petitioners query as to the appropriate school reaction if a student were to espouse his "views" on killing Osama Bin Laden or the acceptability of deer hunting. Petitioners are creating these hypothetical "viewpoints" simply because there are no viewpoints at issue in the actual case before this Court. Indeed, the Third Circuit specifically held that it need not decide the broader question of whether, if and under what circumstances a school may violate an elementary student's right to freedom of speech. *S.G. ex rel A.G.*, 333 F.3d at 423. Pet. App. A11, A12. To the contrary, the Court simply held that under *Fraser*, the Defendants were upholding a reasonable pedagogical concern when acting in response to speech threatening violence and the use of firearms by these students, particularly in the context of the prior weeks of

threats and violence. Moreover, the Court pointed out that qualified immunity undoubtedly applied in that there was certainly no clearly established law prohibiting the defendants' actions.

Petitioners seek nothing less than to render it unconstitutional for a teacher or administrator to punish children for simple misbehavior. This is a dubious goal and it most certainly is contrary to the holdings of this Honorable Court. Petitioner suggests that this Court should abandon its well-established precedent and adopt a new standard, which would take even a modicum of control away from school administrators and place it in the hands of five-year-olds. Rowdiness, threats, and the general whims of these children of tender years would need to be tolerated lest school administrators run the risk of defending lawsuits such as this, instead of teaching our children.

B. PROCEDURAL DUE PROCESS

Contrary to petitioner's assertion, the procedure to be followed in cases of "short term" school suspensions of ten days or less is plainly set forth by this Court in *Goss v. Lopez*, 419 U.S. 565 (1975). This precedent was explicitly followed here by the Third Circuit Court of Appeals. There is no "gap" in jurisprudence as asserted by Petitioners. The law is clear and was properly applied. In cases of suspensions of ten days duration or less, due process requires that the student be "given oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez*, 419 U.S. at 581.

Petitioners seem to rest their entire argument in favor of a new standard on a false premise – that A.G. did not "comprehend what happened". Petition at 7. As the Third Circuit pointed out, the record in no way supports Petitioner's contention in that regard. *S.G. ex rel A.G.*, 333 F.3d at 424. To the contrary, the record shows that this was not a very complicated situation: the boys were brought to the Principal's office, asked for there side of the story, admitted and understood what they did, and were given a minor punishment.

Here, we are dealing with the shortest of short-term suspensions. Lesser procedures than those used here have been found sufficient for suspensions three times as long under the standard set forth in *Goss*. Here, for example, the Principal made phone calls to the parents and spoke with A.G.'s grandmother – steps arguably not even required under the *Goss* standard.

Petitioners do not even allege any conflict or inconsistency between opinions of this Court and any Circuit Court in seeking review of this matter. Instead, Petitioners seek to ignore *Goss*. Hence, their Petition should be denied outright. Moreover, the proposition put forth by Petitioners would turn on its head the day to day ability of our schools to monitor and sanction minor infractions. Indeed, Petitioner would have this Honorable Court set up miniature tribunals before disciplining kindergarten students. This purported result is not only ludicrous, but inimical to established precedent.

III. CONCLUSION

This case does not implicate any important constitutional issues or conflicts. The Court of Appeals for the Third Circuit simply held that, in this case, under these particular facts, Principal Baumann and Superintendent Bauer did not violate any constitutional rights of this kindergarten student and were entitled to qualified immunity. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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